Supreme Court, U.S.
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No. 03-___

IN THE

Supreme Court of the United States

UAW-LABOR EMPLOYMENT AND TRAINING CORP., *et al.*,
Petitioners,

v.

ELAINE L. CHAO, Secretary of Labor, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In implementing the provisions of the National Labor Relations Act, the National Labor Relations Board frequently regulates an area of labor relations by ruling that the NLRA: (i) requires certain employer or union actions; (ii) prohibits certain actions; and (iii) permits, but does not require, others. The court below held that other governmental bodies are free to adopt labor relations regulations that conflict with the NLRB's regulatory scheme by requiring employers or unions to engage in or refrain from actions the NLRB has held to be permitted, but not required, by the NLRA. The question presented by this case is:

> Whether the NLRA preemption doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)—which was designed by this Court to prevent conflict in the regulation of labor relations activities that come within a zone reserved for NLRB jurisdiction—leaves other governmental bodies free to regulate employer or union labor relations activities that the NLRA permits but does not require in a manner that conflicts with the regulatory scheme the NLRB has established.

PARTIES TO THE PROCEEDINGS

The following were plaintiffs/appellees in the courts below and are petitioners in this Court: UAW-Labor Employment and Training Corporation; International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America; Office and Professional Employees International Union, Local 537; and Office and Professional Employees International Union.

The following were defendants/appellants in the courts below and are respondents in this Court: Secretary of Labor (Elaine L. Chao); Administrator, General Services Administration (presently Stephen Perry, Thurman M. Davis, Sr. during the proceedings below); Administrator, National Aeronautics & Space Administration (presently Sean O'Keefe, Daniel S. Goldin during the proceedings below); Secretary of Defense (Donald H. Rumsfeld); Administrator for Federal Procurement Policy, Office of Management & Budget (presently Robert Burton, Angela Styles during the proceedings below); and Director, Office of Management & Budget (presently Joshua B. Bolten, Mitchell E. Daniels, Jr. during the proceedings below).

CORPORATE DISCLOSURE STATEMENT

The UAW-Labor Employment and Training Corporation (UAW-LETC) is a non-profit public benefit corporation organized under California law. UAW-LETC is not a publicly held corporation and does not have any publicly held affiliates. There is no parent or publicly held corporation that owns 10 % or more of UAW-LETC's stock.

The International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Office and Professional Employees International Union, Local 537, and the Office and Professional Employees International Union are all unincorporated labor organizations.

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PETITION FOR A WRIT OF CERTIORARI

The UAW-Labor Employment and Training Corporation, the International Union, the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), the Office and Professional Employees International Union (OPEIU), and OPEIU Local 537 petition for a writ of *certiorari* to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *UAW-Labor Employment & Training Corp. v. Chao*, D.C. Circuit No. 02-5080 (April 22, 2003).

OPINIONS BELOW

The opinion of the court of appeals is reported at 325 F.3d 360 and is attached as Appendix A, pp. 1a-15a. The opinion of the district court is unreported and is attached as Appendix B, pp. 16a-34a. The order of the court of appeals denying

rehearing is unreported and is attached as Appendix C, p. 35a. Executive Order 13201 is published at 66 Fed. Reg. 11221 and is attached as Appendix D, pp. 36a-43a.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2003. A timely petition for rehearing was denied on September 11, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(3) of the National Labor Relations Act, as amended, provides:

"It shall be an unfair labor practice for an employer—

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an

agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 10(a) of the Act provides in relevant part:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

STATEMENT OF THE CASE

This action—brought by a federal contractor and by three labor unions representing employees of federal contractors—challenges Executive Order 13201 entitled "Notification of Employee Rights Concerning Payment of Union Dues or Fees," 66 Fed. Reg. 11221 (2001), as beyond the President's authority on the ground that the Executive Order regulates the labor relations of federal contractors covered by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, in a manner that conflicts with Congress' scheme of labor relations regulation embodied in the NLRA.[1]

1. Executive Order 13201 mandates that "all government contracts involving more than $100,000 . . . must include a provision requiring contractors to post notices at all of their facilities informing employees of what are commonly known as *General Motors* and *Beck* rights . . . [i.e.,] rights under

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[1] This action also challenged the Executive Order on the ground that—wholly aside from the conflict with the NLRA—the Order is beyond the President's authority under the Procurement Act, 40 U.S.C. § 121, *et seq.*

federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities" and "tell[ing] them how they may contact the National Labor Relations Board ('NLRB') for additional information." Pet. App. 1a-2a, citing *Communications Workers v. Beck*, 487 U.S. 735, 754-763 (1988), and *NLRB v. General Motors Corp.*, 373 U.S. 734, 739-745 (1963). In addition, the Executive Order requires covered federal contractors to impose the same posting requirement on subcontractors who provide the contractors with goods or services. Pet. App. 18a. The stated goal of the Executive Order is to provide that "workers are better informed of . . . their rights under the Federal labor laws [*viz.*, under the NLRA]." *Id.* at 36a § 1(a).

The Executive Order charges the Secretary of Labor with enforcement, authorizing her "to impose substantial penalties on those employer-contractors who do not post the . . . notice, including canceling their current government contracts and debarring them from obtaining future government contracts." Pet. App. 18a.

2. The district court concluded that Executive Order 13201 conflicts with the National Labor Relations Act by "regulat[ing] in a core labor-management area regulated by the NLRA" and "by imposing a duty on employers that the NLRA, as construed by the NLRB, does not impose." Pet. App. 33a. In the latter regard, the district court noted that in *Rochester Mfg. Co.*, 323 NLRB 260 (1997), "the NLRB, the administrative body charged with interpreting and adjudicating NLRA rights, held that the NLRA does not require employers to post notices informing workers of their rights under *Beck* and *General Motors*." Pet. App. 30a.

Based on its conclusion that "the Executive Order in this case . . . conflicts with the NLRA . . ., because it sets a different standard of conduct for employers than that set by the NLRA," Pet. App. 30a, the district court entered a

judgment declaring that "Executive Order 13,201 is invalid and of no force and effect" and "permanently enjoin[ing] [the defendants] from implementing and enforcing Executive Order 13,201," *id.* at 34a.[2]

3. A divided panel of the District of Columbia Circuit reversed the district court's ruling that Executive Order 13201 is invalid.

Writing for the panel majority, Judge Williams acknowledged that the Executive Order is "regulatory" in nature, Pet. App. 9a, and that—by imposing an employer notice requirement of the sort the NLRB "deliberately" declined to adopt in *Rochester Manufacturing*—"the [executive] order . . . conflicts with the 'regulatory scheme' the Board has established," *id.* at 4a. That being so, Judge Williams also acknowledged that "the order [would be NLRA] preempted . . . under 'field' preemption [analysis]." *Id.* at 4a-5a. "[B]ut," said Judge Williams, the NLRA preemption doctrine stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny, "works differently." *Id.* at 5a.

According to the D.C. Circuit majority, "*Garmon* . . . operat[es] only as to activities arguably protected or prohibited, *not* to ones simply left alone [by the NLRB], even if left alone deliberately." Pet. App. 5a (emphasis in original). Therefore, once "the Board has decided that [a labor relations] activity is not prohibited" but rather left to employer or union option, that activity may be regulated by other government law makers, from the federal Executive Branch to the States and, indeed, to the smallest locality. *Id.* at 5a.

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[2] The district court—having held "the Order invalid under the NLRA"—saw "no need to address plaintiffs' additional claim that the Executive Order is invalid under the Procurement Act." Pet. App. 34a n. 11.

Elaborating on this understanding of *Garmon* preemption, Judge Williams explained that "before *Rochester Manufacturing*, where the Board rejected the claim that an employer committed an unfair labor practice by failing to post a *Beck* notice . . . , that position was 'arguable' and thus [an Executive Order requiring such a posting was] likely subject to *Garmon* preemption." Pet. App. 8a-9a. After *Rochester Manufacturing* such a posting was no longer arguably required by the NLRA, and thus, on the D.C. Circuit majority's view, could be required by Executive Order—or by state or local law—at least until "a reversal of position by the Board" on this matter, which would "entail a reversal of th[e] outcome on preemption." *Id.* at 5a.[3]

Judge Rogers dissented. In agreement with the district court, Judge Rogers concluded that the Executive Order "is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)." Pet. App. 11a. In this regard, Judge Rogers explained that "[t]he Executive Order . . . would regulate activities regarding union-security clauses, an area where the National Labor Relations Board has

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[3] While not a subject of this *certiorari* petition, we note that the D.C. Circuit majority also rejected the Procurement Act challenge to Executive Order 13201 and did so by holding that the Executive Order satisfied the requirement stated in *AFL-CIO v. Kahn*, 618 F.2d 784 (D.C. Cir. 1979), that an "executive order [must] have a 'sufficiently close nexus' to the values of providing the government an 'economical and efficient system for . . . procurement and supply.'" Pet. App. 9a, quoting 618 F.2d at 792 & 788. In this regard, Judge Williams observed that the Executive Order's attempt "to connect its requirements to economy and efficiency"—by positing that the notice would create a "better informed," and for that reason more productive, "workforce from which the United States may draw" for its "procurement contracts"—"seem[ed] attenuated (especially since unions already have a duty to inform employees of these rights)." Pet. App. 9a-10a. Indeed, Judge Williams opined that the Executive Order was just as likely to have the "opposite effects or no effects at all." *Id.* at 10a. But, the D.C. Circuit majority nevertheless concluded that "under *Kahn*'s lenient standards, there is enough of a nexus." *Id.*

primary jurisdiction under the National Labor Relations Act ('NLRA'), and it would do so in a manner that imposes a duty on employers that the NLRA, as interpreted by the Board, does not impose." *Id.* at 10a.

Judge Rogers was joined by Judge Edwards in dissenting from the D.C. Circuit's refusal to rehear this case *en banc*. Pet. App. 35a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit has put a gloss on this Court's "*Garmon* doctrine" that flies in the face of the NLRA preemption jurisprudence developed by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny. The D.C. Circuit has reduced "[t]he [*Garmon*] rule[, which] is designed to prevent 'conflict in the broadest sense' with the [NLRA's] 'complex and interrelated federal scheme of law, remedy and administration,'" *Wisconsin Dept. of Industry v. Gould, Inc.*, 475 U.S. 282, 286 (1986) (quoting *Garmon*, 359 U.S. at 243), to a mechanical formula that invites far-ranging conflicts and that generates a shifting, senseless pattern of preemption results.

The *Garmon* doctrine, said the D.C. Circuit, establishes preemption rules—*viz.*, rules barring other governmental bodies (e.g., the federal Executive Branch, the States or localities) from regulating labor relations activities that are subject to regulation through the NLRB's administrative processes—that "operat[e] *only* as to activities arguably protected or prohibited" by the NLRA. Pet. App. 5a (emphasis added). On that premise, once "the Board has decided that [a labor relations] activity is not prohibited" and is instead deliberately left to employer or union option as a permissible activity, *id.*—and so long as the Board hews to its decision—other governmental bodies are free to regulate the activity in a manner that "conflicts with the 'regulatory scheme' the Board has established," *id.* at 4a.

The D.C. Circuit's gloss on *Garmon* is thus an open invitation to regulation of labor relations activity by other governmental bodies that "conflicts with the 'regulatory scheme' the Board has established" by imposing on employers or unions obligations that the Board has "deliberately" declined to impose. Pet. App. 4a-5a. In issuing this invitation, the D.C. Circuit has disregarded the *Garmon* doctrine's essential point, which is "to avoid conflicting regulation of conduct [coming within the regulatory authority of the NLRB] by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-286 (1971). And, the invitation to conflicting regulation of labor relations activity is a broad one that "sacrifice[s] important federal interests in a uniform law of labor relations centrally administered by an expert agency." *Id.* at 291.

In treating with employer and union activities covered by the NLRA, the NLRB often proceeds by neither prohibiting the activity nor declaring it protected but by ruling that the Act grants employers and unions the option to engage in or refrain from the activity, *viz.*, by ruling that the Act permits—but does not require—the activity in question. In addition to the matter of employer notification of *Beck* rights at issue here, other examples range from the analogous matter of employer notification of the right of employees to union representation at disciplinary interviews to the core matter of employer recognition of a union that presents substantial evidence of majority employee support. *See* pp. 12-13, *infra*. Under the D.C. Circuit's decision, on all such matters, other governmental bodies—from the federal Executive Branch to the States and down to the localities—are free to step into an area covered by the NLRA and to transmute what the Board has held to be labor relations activity permitted but not required by the NLRA into labor relations activity that is prohibited or required by a non-NLRA set of labor relations regulations.

In short, by elaborating the *Garmon* doctrine in just the "literal, mechanical fashion" this Court has rejected, *Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983) (quoting *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 188 (1978)), the D.C. Circuit's decision undermines the NLRA preemption regime this Court "designed to 'prevent conflict in the broadest sense.'" *Gould*, 475 U.S. at 286.

But there is more. The D.C. Circuit's mechanical approach to *Garmon* preemption leads to a pattern of shifting and senseless preemption results. On that approach, any governmental body may regulate any activity covered by the NLRA—from employer notification of various NLRA rights to employer recognition of a union—so long as the Board has ruled that the Act permits, but does not require, the activity in question. Such non-NLRA regulation, however, becomes preempted should the Board reconsider its ruling and determine that the activity is either prohibited or required by the NLRA. The D.C. Circuit ventured no explanation as to why—or to what end—the NLRA should generate such a here-again/gone-again preemption effect, and we would venture the suggestion that there is no cogent explanation.

To assure the integrity of the uniform NLRA system for regulating labor relations as implemented by the NLRB, in the half century since *Garmon*, this Court has carefully scrutinized lower court decisions permitting other governmental bodies to enter the labor relations field occupied by the NLRA. The D.C. Circuit decision here sanctions such a deep incursion into the NLRA's domain and is in such conflict with the *Garmon* doctrine's rationale and purposes as to require such scrutiny.

As the court having plenary jurisdiction over the Federal government, the D.C. Circuit has been the arbitrator for disputes over the legality of several recent Executive Orders that regulate labor relations matters also regulated by the NLRA. *See Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Building & Construction Trades Dept. v.*

Allbaugh, 295 F.3d 28 (D.C. Cir. 2002). And, the D.C. Circuit has now seized upon that role to issue a decision having nationwide effect that fundamentally distorts the *Garmon* doctrine.

This Court should grant *certiorari* to review the decision below, to correct the D.C. Circuit's serious misinterpretation of the *Garmon* doctrine and to vindicate Congress' intent that there be a single, uniform NLRA system of labor relations regulation implemented by the NLRB.

1. The *Garmon* "rule of pre-emption is designed to prevent conflict between, on the one hand, state and local [and federal Executive Branch] regulation and, on the other, Congress' 'integrated scheme of regulation,' *Garmon*, 359 U.S. at 247, embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB . . . as the appropriate body to implement the Act." *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 225 (1993), citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-749 & n. 26 (1985). That being so, "[a] full understanding of the particular pre-emption rule set forth in *Garmon* especially requires . . . appreciation of the precise nature and extent of the potential for injurious conflict that would inhere in a system unaffected by such a doctrine." *Lockridge*, 403 U.S. at 286.

The *Garmon* doctrine is "concerned . . . with delimiting areas of conduct which must be free from [other] regulation if national policy is to be left unhampered." 359 U.S. at 246. *Garmon* delimits those areas by providing that other governmental bodies "must defer to the exclusive competence of the National Labor Relations Board" with regard to any labor relations activity "that may fairly be assumed . . . [to be] protected by § 7 of the National Labor Relations Act, or [to] constitute an unfair labor practice under § 8," and, more generally, with regard to any "activity [that] is arguably subject to § 7 or § 8 of the Act." *Id.* at 244 & 247. *See also*

id. at 246 (When an "activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced.").[4] In other words, the *Garmon* doctrine "prevents a State [or other governmental body] from regulating within . . . a zone protected and reserved . . . for NLRB jurisdiction." *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 226-227.

As a matter of logic, an employer or union labor relations activity that the NLRB "deliberately" refuses to require, Pet. App. 5a—on the ground that the NLRA permits, but does not require, the activity—is an activity that is "subject to § 7 or § 8 of the Act," *Garmon*, 359 U.S. at 245, and is a matter within "a zone protected and reserved . . . for NLRB jurisdiction," *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 227. Indeed, the opposite understanding would make large areas of "conduct subject to the regulatory jurisdiction of the NLRB," *Metropolitan Life Ins.*, 471 U.S. at 749, subject to conflicting federal Executive Branch, State and local regulation.[5]

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[4] The *Garmon* Court did temper this sweeping preemption rule by stating that "due regard for the presuppositions of our embracing federal system . . . required [the Court] not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [it] could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243 (citation omitted). Neither of these grounds for allowing parallel state regulation of a labor relations activity subject to NLRA regulation is remotely implicated in this case.

[5] In reaching that opposite understanding, the D.C. Circuit erroneously placed heavy reliance on cases such as *Longshoremen v. Davis*, 476 U.S. 380 (1986), and *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181 (1965). Pet. App. 5a. In those cases, however, the Board held that the labor relations activity in question was wholly outside the NLRA's regulatory scope, because the persons involved were not "employees"

In attempting "to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further the common good," *Lockridge*, 403 U.S. at 286, the Board often frames a set of rules governing a particular labor relations area that require certain employer or union actions, prohibit others, and leave still others to private employer or union decision making. As we have noted, two concrete examples illustrate this point.

The first—which is at the core of the Act—is the interlocking set of rules the Board has articulated regarding employer recognition of a union as an exclusive bargaining representative. Under these rules, an employer *cannot* recognize a union that has neither been certified on the basis of an NLRB election nor presented substantial evidence of majority support. *Garment Workers v. NLRB*, 366 U.S. 731 (1961). But an employer *may* recognize a union not certified by the Board that has presented such evidence of majority support, *Jerr-Dan Corp.*, 237 NLRB 302 (1978), and *may also* refuse to recognize an uncertified union that has presented such evidence of majority support, *Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974).

The NLRB certainly possesses sufficient statutory authority to require an employer to recognize an uncertified union that presents substantial evidence of majority support. Indeed, from its decision in *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), to its decision in *Linden Lumber*, the Board read the Act to impose that requirement on employers. An

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covered by the Act. What *Longshoremen* and *Hanna Mining* show, then, is that where the activity in question involves persons who are not covered by the NLRA at all, the activity is *not* "subject to the regulatory jurisdiction of the NLRB," and there is no *Garmon* preemption. Thus, *Longshoremen* and *Hanna Mining* are simply inapposite where the persons involved are "employees" covered by the NLRA and within the NLRB's regulatory authority.

employer's obligation to recognize an uncertified union that has presented substantial evidence of majority support is, thus, as clearly "subject to § 7 or § 8 of the Act" and within the "zone protected and reserved . . . for NLRB jurisdiction," when the Board has construed the Act to make such recognition a permitted but not a required employer action as it was when the Board construed the Act to make such recognition a required employer action. *See Aeroground, Inc. v. City & County of San Francisco*, 170 F.Supp.2d 950 (N.D. Cal. 2001) (finding an municipal airport regulation requiring union recognition whenever a majority of employees signs union authorization cards to be preempted by the NLRA).

A second example, close to this case, is the interlocking set of rules the Board has articulated regarding union representation of an employee at an employer disciplinary interview. The NLRB has held, first of all, that an employer must honor an employee's request to have a union representative present at a disciplinary interview. *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975). At the same time, the Board has held that the employer is permitted—but is *not* required—to notify an employee of this right at the time he or she is called into a disciplinary interview. *See Pick-N-Pay Supermarkets, Inc.*, 247 NLRB 1136, 1138 (1980).

The NLRB certainly possesses sufficient statutory authority to require employers to provide employees notice of their *Weingarten* rights just as the Board requires unions to notify employees of their union security agreement rights. An employer obligation to provide notice of *Weingarten* rights is thus clearly "subject to § 7 or § 8 of the Act" and is a matter within "a zone protected and reserved . . . for NLRB jurisdiction." And, this is so when the Board has construed the Act to make such a notice a permitted but not required employer action just as it would be if the Board had construed the Act to make the provision of such a notice a required employer action.

As these examples demonstrate, it could not be more clear that by reason of the *Garmon* doctrine other governmental bodies are *not* free to treat Board decisions construing the Act to permit but not require certain employer or union labor relations activity as creating a regulatory vacuum that these bodies may fill by issuing laws, regulations or orders requiring or prohibiting the labor relations activity in question. The *Garmon* doctrine leaves no room for the D.C. Circuit's erroneous view that every time the Board decides to proceed by ruling that an NLRA regulated activity is permissible but not required, employers, unions and employees can be subjected to an array of inconsistent and, perhaps, contradictory legal commands from other governmental bodies in direct contravention of Congress' intent that there be a single, uniform NLRA system of labor relations regulation implemented by the NLRB.

2. To bring the foregoing home, there can be no doubt that the conduct mandated by Executive Order 13201—"Notification of Employee Rights Concerning Payment of Union Dues or Fees," Pet. App. 36a—is "conduct subject to the regulatory jurisdiction of the NLRB." *Metropolitan Life Ins.*, 471 U.S. at 749. Indeed, the Executive Order acknowledges as much by including a passage in the mandated notice directing employees to "contact the National Labor Relations Board" for "further information concerning your rights." Pet. App. 38a.

The Executive Order "requir[es] contractors to post notices at all of their facilities informing employees of what are commonly known as *General Motors* and *Beck* rights . . . [i.e.,] rights under federal labor law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities." Pet. App. 1a-2a, citing *Communications Workers v. Beck*, 487 U.S. 735, 754-763 (1988), and *NLRB v. General Motors Corp.*, 373

U.S. 734, 739-745 (1963). These rights are derived from NLRA § 8(a)(3) and its correlate § 8(b)(2). *Marquez v. Screen Actors Guild*, 525 U.S. 33, 36 (1998).

NLRA §§ 8(a)(3) & 8(b)(2) are among the provisions defining employer and union "unfair labor practices." 28 U.S.C. § 158. And, by NLRA § 10(a), "[t]he [National Labor Relations] Board is empowered, as [there]after provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." 29 U.S.C. § 160(a).

Given the NLRB's authority to "prevent any person from engaging in any unfair labor practice," 29 U.S.C. § 160(a), "all the details necessary to make the [§§ 8(a)(3)/8(b)(2)] rule of [*General Motors* and] *Beck* operational were left to the Board." *Int'l Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1015 (7th Cir.), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998).

In the exercise of that authority, "the Board has held . . . that *unions* have an obligation to notify employees of their [*General Motors* and] *Beck* rights." *Marquez*, 525 U.S. at 43 (emphasis added). And, in "defining the content of the notification right," the Board has stated a comprehensive set of rules "giv[ing] guidance to unions about what they must do to notify employees about their rights under *Beck* and *General Motors*." *Id.* In this regard, the Board has held that unions must inform all employees covered by a union security agreement: (i) of "their *General Motors* rights to be and remain nonmembers;" and (ii) that "employees who are not union members . . . have the right to limit their payment of union-security dues and initiation fees to moneys spent on activities germane to their union's role as a [collective bargaining] representative." *Rochester Mfg. Co.*, 323 NLRB 260, 260 (1997).

In delineating the employers' role, the Board has held that "employers . . . are not under an affirmative obligation to spell out for employees the precise extent of the union-security obligation." *Rochester Mfg.*, 323 NLRB at 262. Rather, the employer is permitted, but not required, to "spell out . . . the union security obligation" subject to the limitation that where an employer does so, "if the employer affirmatively gives employees an incorrect message under threatened loss of employment (e.g., payment of dues is insufficient; full membership is required) that would constitute a violation of the Act." *Id.* at 262 n. 8.

The premise of the Executive Order is that the *Beck* notice regime crafted by the NLRB—which places an affirmative duty on unions to inform employees of their *General Motors* and *Beck* rights and a negative duty on employers not to provide misinformation in this regard—is inadequate and that employees will be "better informed of their [*General Motors*/*Beck*] rights" if employers are required to post a workplace notice describing those rights in the form drafted by the Executive Branch. Pet. App. 36a § 1(a).

The Executive Order's notice requirement thus "serves plainly as a means of enforcing the NLRA." *Gould*, 475 U.S. at 287. The Executive Order seeks to supplement the NLRB's regime for implementing NLRA §§ 8(a)(3)/8(b)(2) by imposing a requirement on employers that the Board has deliberately chosen not to impose. And, "this Court has recognized that 'conflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.'" *Id.* at 286 (brackets omitted) quoting *Lockridge*, 403 U.S. at 287.

The point, of course, is not whether the NLRB's *Beck* notice regime or the Executive Order's approach is, on some

standard, superior.[6] Rather, the salient point is that the Executive Order regulation conflicts with the NLRB's regulation by imposing an obligation on employers that the Board has ruled the NLRA does not impose. And, the even more far-reaching point is that, if the President's action "is valid, nothing prevents other [governmental bodies] from taking similar action." *Gould*, 475 U.S. at 288.

Indeed, on the D.C. Circuit's decision here nothing prevents other potential regulators, such as the States or local-

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[6] We would note in this regard that NLRA §§ 8(a)(2) & 8(a)(3) cut strongly against any requirement that employers provide *Beck* notices. NLRA § 8(a)(2) makes it an unfair labor practice for an employer to "interfere with the . . . administration of any labor organization." 29 U.S.C. § 158(a)(2). And, in order to minimize the danger of such interference, the limitations on the administration of union security agreements in the second proviso to § 8(a)(3)—the proviso from which the *General Motors* and *Beck* rights are derived—were deliberately drafted so that they "do not require the employer to inquire into the internal affairs of the union." S. Rep. No. 105, 80th Cong., 1st Sess., p. 20 (1947).

By requiring the employer to become a party to what is, under the Board's *Beck* notice regime, a dialogue between the employee and the union and the represented employees regarding the employees' *General Motors* and *Beck* rights, the Executive Order serves to generate employer interference with internal union affairs. The Executive Order notice does not purport to provide complete information about the *General Motors/ Beck* rights to join, not join or resign from the union as a full member and to object or not to object to paying full union dues. And, the notice could not provide concrete information about how to exercise these rights by taking such steps as resigning from union membership or objecting to the payment of full dues. Requiring the employer to post such a notice is, therefore, simply a way station toward more elaborate employer/employee interchanges on acquiring or relinquishing union membership and on paying or not paying full union dues. And, there is the distinct risk that the run of employers will treat such discussions as the occasion to weaken the union rather than to strengthen employee rights. *See North Bay Dev. Disabilities Services v. NLRB*, 905 F.2d 476, 479 (D.C. Cir. 1990) (noting the employer's conflict of interests in this regard).

ities, from taking diametrically opposed action by forbidding employers from providing any form of *Beck* notice, thereby subjecting certain employers to three conflicting *Beck* notice regimes: the NLRB's, which permits, but does not require, employers to provide *Beck* notices, so long as the notice is accurate; the Executive Order's, which requires employers to provide a *Beck* notice drafted by the Executive Branch; and the State's or locality's, which, in the interest of preventing employer interference in internal union affairs, prohibits employers from providing any form of *Beck* notice.

The sum of the matter is, as the NLRB recently said to the Ninth Circuit, that "[t]he regulatory responsibilities that Congress assigned to the Board would be frustrated if states"—and, by the same token, the federal Executive Branch—"were free to bring conflicting or additional regulations to bear on the same conduct that Congress determined should be governed by uniform federal [NLRA] law." Brief for the NLRB as *Amicus Curiae*, p. 8, *Chamber of Commerce v. Lockyer*, Ninth Cir. Nos. 03-55166 & 03-55169.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5080

UAW-LABOR EMPLOYMENT AND TRAINING CORPORATION, *et al.*,
Appellees,

v.

ELAINE CHAO, SECRETARY OF LABOR, *et al.*,
Appellants.

March 7, 2003, Argued
April 22, 2003, Decided

Before: RANDOLPH and ROGERS, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*. Opinion for the Court filed by Senior Circuit Judge WILLIAMS. Dissenting opinion filed by Circuit Judge ROGERS.

OPINION:

WILLIAMS, *Senior Circuit Judge*: On February 17, 2001, relying on his power under the *Procurement Act*, President Bush issued Executive Order 13201, applying to all government contracts involving more than $ 100,000. Executive Order 13201, § 2, 66 Fed. Reg. 11,221, 11,221 (2001); 41 U.S.C. § 403(11) (2000). Under the order, each such contract must include a provision requiring contractors to post notices at all of their facilities informing employees of what are commonly known as *General Motors* and *Beck* rights. *See* Executive Order 13201, § 2, 66 Fed. Reg. at 11,221-22 (2001). (In addition, contractors must require subcontractors to post such a notice. *Id.*) These are rights under federal labor

law that protect employees from being forced to join a union or to pay mandatory dues for costs unrelated to representational activities. See *Communications Workers v. Beck*, 487 U.S. 735, 754-63 (1988); *see also NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 739-45 (1963). Besides informing employees of their Beck rights, the notice is to tell them how they may contact the National Labor Relations Board ("NLRB") for additional information. 66 Fed. Reg. at 11,222.

Plaintiffs brought suit against the Secretary of Labor and the members of the Federal Acquisition Regulatory Council, seeking declaratory and injunctive relief. The plaintiffs are the UAW-Labor Employment and Training Corp. ("UAW") and three unions. UAW is a non-profit organization that provides job training and placement services; it is a federal contractor - subject to the executive order. Accordingly it clearly has standing, and we need not consider whether the other plaintiffs do. See *Mountain States Legal Found. v. Glickman*, 320 U.S. App. D.C. 87, 92 F.3d 1228, 1232 (D.C. Cir. 1996).

The plaintiffs claimed that the order was preempted by the *National Labor Relations Act* ("NLRA"), 29 U.S.C. § 151 *et seq.*, and also that, for want of an adequate nexus to the government's interest in efficient and economical contracting, the President had no authority to issue it under the Federal Property and Administrative Services Act of 1949 (the "Procurement Act"), 40 U.S.C. § 471 *et seq.* (now codified as amended at 40 U.S.C. § 101 *et seq.*). The district court found preemption, granted declaratory relief, and issued a permanent injunction barring enforcement of the order. It didn't reach the *Procurement Act* question, but the plaintiffs raise it here as an alternative ground for affirmance. Finding both of plaintiffs' theories to be flawed, we reverse and remand for the district court to grant summary judgment in favor of the government.

As the issues relate solely to summary judgment, we review de novo. See *Indep. Bankers Ass'n v. Farm Credit Admin.*, 334 U.S. App. D.C. 82, 164 F.3d 661, 666 (D.C. Cir. 1999).

* * *

Federal labor law preemption falls into two categories, *Garmon* and *Machinists* preemption, named after the cases authoritatively articulating the theories—*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). *Garmon* preemption applies to regulation (usually by states) of activities that are arguably "protected by § 7 of the *National Labor Relations Act*, or constitute an unfair labor practice under § 8." *Garmon*, 359 U.S. at 244. *Machinists* preemption applies when a state attempts to regulate an activity that, although not necessarily protected or prohibited by the NLRA, is an "economic weapon" the exercise of which Congress intended to leave unrestricted. *Machinists*, 427 U.S. at 141. No claim is made that the posting of employees' *Beck* rights represents an economic weapon—certainly not one covered by Machinists preemption. Rather the plaintiffs argue and the district court found that the executive order is preempted under *Garmon*.

We first consider the government's suggestion that our preemption analysis should be less intrusive because the order only imposes a contract condition, and firms can choose to do business elsewhere. But at least in labor law, preemption applies to rules of the federal executive even when the government is acting as a purchaser of goods, as long as the government action is classified as regulatory rather than proprietary. See *Chamber of Commerce v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1334, 1336-37 (D.C. Cir. 1996); *Bldg. & Constr. Trades Dep't v. Allbaugh*, 353 U.S. App. D.C. 28, 295 F.3d 28, 34 (D.C. Cir. 2002). A clause is likely

to be found regulatory where it apparently "seeks to set a broad policy." *Chamber of Commerce*, 74 F.3d at 1337. Here, the government doesn't explicitly argue that its actions are proprietary, but notes occasionally that it is only inserting conditions into a contract that businesses voluntarily accept. But as the order operates on government procurement across the board, rather than being tailored to any particular setting, the order is regulatory under prevailing principles. See *id.* at 1336-37.

As we've said, *Garmon* preempts state (or here, federal executive) regulation of "activities [that] are protected by § 7 of the *National Labor Relations Act*, or constitute an unfair labor practice under § 8." *Garmon*, 359 U.S. at 244. The district court misconceived this doctrine. It said that under *Garmon* "the question is not whether the NLRA prohibits employers from posting *Beck/General Motors* notices . . . but whether the NLRA prohibits *requiring* employers to post the notices." District Court Opinion at 14. The NLRB had ruled in *Rochester Manufacturing Co.*, 323 N.L.R.B. 260 (1997), that it was not an unfair labor practice for an employer to say nothing to employees about their *Beck* rights, *id. at 262*, and the district court read *Rochester Manufacturing* as meeting its (misformulated) test. But the question under *Garmon* is whether the "*activities*" are protected or prohibited. 359 U.S. at 244; *see also Wisconsin Dep't of Indus. v. Gould Inc.*, 475 U.S. 282, 286 (1986) ("States may not regulate *activity* that the NLRA protects, prohibits, or arguably protects or prohibits.") (emphasis added). Under the district court's approach every activity deemed by the Board *not* to be an unfair labor practice would be preempted, even though the Board had said no more than that the NLRA didn't speak to the matter at all.

The dissent makes a similar error when it suggests that the order is preempted because it conflicts with the "regulatory scheme" the Board has established. *See* Dissent at 3. This

would be a sound analysis under "field" preemption, *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), but *Garmon* works differently, operating only as to activities arguably protected or prohibited, *not* to ones simply left alone, even if left alone deliberately.

In the passage from *Gould* quoted above, the Court said (as indeed it had in *Garmon*, 359 U.S. at 245) that *Garmon* preemption applies even to activities that are only "arguably" protected or prohibited by the NLRA. Plaintiffs note that in *Rochester Manufacturing* the General Counsel in fact argued that not posting of *Beck* rights was an unfair labor practice. Assuming that a ruling accepting the General Counsel's position would survive deferential judicial review, it must follow, they say, that non-posting is "arguably" prohibited. (They make no claim that *posting* is arguably an unfair practice.) But *International Longshoremen's Association v. Davis*, 476 U.S. 380, 394-98 (1986), indicates that the Board's *actual decision* controls; even if "there is an arguable case for preemption," the court "must defer to the Board, and only if the Board decides that the conduct is not protected or prohibited," is the regulation preemption-free. *Id.* at 397. *See also id.* at 395 (saying that the party claiming pre-emption must "advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts *or the Board*") (emphasis added); *Hanna Mining Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181, 190 (1965) ("We hold that the Board's statement [that the engineers were supervisors and thus not subject to the NLRA] *does resolve* the question with the clarity necessary to avoid preemption.") (emphasis added). Here the Board has decided that the activity is not prohibited. Of course a consequence may be that a reversal of position by the Board (if permissible) will entail a reversal of this outcome on preemption, but that is a consequence plainly contemplated in the Court's conclusion in *Davis* that a Board

decision can resolve what is "arguable" for *Garmon* purposes. As a result, there is little basis for the dissent's concern that the Executive Order "would shift these decisions away from the Board." See Dissent at 2.

Garmon preempts not only regulation of activities arguably prohibited by the NLRA, but also regulation of ones arguably protected. Plaintiffs and our dissenting colleague argue that precisely such an activity is in question here—the employer's right to speak, protected by *§ 8(c) of the Act*:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). We consider this speech argument only in the context of preemption; plaintiff raises no free-standing *First Amendment* claim.

Of course *Garmon*'s own expression of its scope limits its preemption to activities that are arguably "protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." 359 U.S. at 244. Fitting a *Garmon* claim under the language of § 8(c) is awkward. That provision is expressly aimed at a special problem--the risk that a party's advocacy ("views, argument, or opinion") might be burdened (considered "evidence of an unfair labor practice") even though it contained "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). Thus § 8(c) works to *negate* an unfair labor practice claim against an employer posting a notice. But that gives it only a peripheral link to the subject of *Garmon*. Even if we delete *Garmon*'s references to specific sections, the activities described in § 8(c) do not "constitute an unfair labor practice," except by negation, and are not "protected *by*" the NLRA, except from the NLRA itself.

Nonetheless, because the Supreme Court has rather ambiguously invoked § 8(c) in determining whether state libel laws were subject to *Garmon* preemption (and finding that they were in some circumstances), *Linn v. United Plant Guard Workers*, 383 U.S. 53, 58 n.3, 62-63 (1966),[1] we simply assume arguendo that § 8(c) rights could be a basis for preemption.

Section 8(c) "implements the *First Amendment*" in the labor relations area. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). And the *First Amendment* includes not only the right to speak, but also the right not to speak. See *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796-97 (1988). But this is as far as plaintiffs' arguments can take them; even assuming that the § 8(c) right includes the right not to speak, an employer's right to silence is sharply constrained in the labor context, and leaves it subject to a variety of burdens to post notices of rights and risks. *See, e.g., Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 113-16 (2d Cir. 2001) (hazard labeling law); *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975) (posting of OSHA notice). Thus the dissent understandably offers no argument that employers' silence as to *Beck* rights is in fact protected (or even arguably protected). Its suggestion that the Board somehow acknowledged or created such a right in *Rochester*, see Dissent at 2, is perplexing, as the Board found only that it was not an unfair labor practice for the employer to not post the rights, see *Rochester*, 323 N.L.R.B. at 262, not that there was a right to silence or any § 8(c) protection. Thus the plaintiffs have pointed to no specific right covered by the order that is "arguably protected by the NLRA."

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[1] The Court's opinion is unclear whether *Garmon* preemption applied because the speech in question was an activity arguably *prohibited* by the NLRA, so that § 8(c) simply limited the scope of, but was not a source of, preemption; *or* whether the speech in question was arguably "*protected*" by the NLRA.

Finally, both the district court and the plaintiffs invoke language from our decision in *Chamber of Commerce*. There we struck down an executive order barring employers who contracted with the government from hiring permanent replacements, finding it preempted under *Machinists* because hiring permanent replacements was among the "economic weapons" that Congress intended the NLRA would leave in the hands of unions or management, as the case might be. 74 F.3d at 1334. In fact, *Machinists* mentioned hiring of permanent replacements as just such a weapon. 427 U.S. at 153. Here of course no one suggests that *Machinists* applies at all. In a paragraph at the end of *Chamber of Commerce*, however, the court said that "it appeared" that the regulations also ran afoul of *Garmon*, 74 F.3d at 1338-39. We explained that the regulations would produce "a direct conflict with the NLRA," namely, by requiring some employers to bargain with a labor union that had lost majority support. *Id.* No such conflict exists here, so that aspect of *Chamber of Commerce* has no application.

Plaintiffs also point to a footnote in *Chamber of Commerce*, where we said:

> We are also dubious that President Bush's Executive Order 12,800, which required government contractors to post notices informing their employees that they could not be required to join or remain a member of a union, was legal. It may well have run afoul of *Garmon* preemption which reserves to NLRB jurisdiction *arguably* protected or prohibited conduct.

74 F.3d at 1337 n.10 (emphasis added). This of course refers to the *Beck* order issued by the first President Bush, which no one claims is materially different (for present purposes) from that of the current President. But we decided *Chamber of Commerce* before *Rochester Manufacturing*, where the Board rejected the claim that an employer committed an unfair labor practice by failing to post a *Beck* notice. 323 N.L.R.B. at 262.

Until *Rochester Manufacturing*, therefore, under the framework set by *Davis*, that position was "arguable" and thus likely subject to *Garmon* preemption. We also note that the footnote is attached to an extensive discussion about whether the disputed executive order was regulatory or proprietary, and thus appears mainly to suggest that the court would also have classified the *Beck* order as regulatory; we agree.

* * *

As an alternative ground for affirmance the plaintiffs argue that the order is not within the President's authority under the *Procurement Act. That* act authorizes him to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act." 40 U.S.C. § 486(a) (2000) (now codified as amended at 40 U.S.C. § 121). In *AFL-CIO v. Kahn*, 199 U.S. App. D.C. 300, 618 F.2d 784 (D.C. Cir. 1979), we read this as requiring that the executive order have a "sufficiently close nexus" to the values of providing the government an " 'economical and efficient system for . . . procurement and supply.'" *Id.* at 792, 788 (quoting 40 U.S.C. § 471 (now codified as amended at 40 U.S.C. § 101)). We emphasized the necessary flexibility and "broad-ranging authority" that we understood the Act to give the President. *Id.* at 789. And in fact we found the nexus test satisfied. Although the order required the government to prefer a high bid to a low one, where the low bidder was not in compliance with the government's price and wage guidelines, we accepted the proposition that the order would induce companies to comply, thereby slowing inflation, so that "the Government will face lower costs in the future." 618 F.2d at 792-93.

Here the executive order sought to connect its requirements to economy and efficiency as follows:

> When workers are better informed of their rights, including their rights under the Federal labor laws, their

> productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.

Executive Order 13201, § 1(a), 66 Fed. Reg. at 11,221. The link may seem attenuated (especially since unions already have a duty to inform employees of these rights), and indeed one can with a straight face advance an argument claiming opposite effects or no effects at all. But in *Kahn*, too, there was a rather obvious case that the order might in fact increase procurement costs (as it plainly did in the short run); under *Kahn*'s lenient standards, there is enough of a nexus.

* * *

We reverse the district court's grant of summary judgment for the plaintiffs. As they asserted only the *Garmon* and *Procurement Act* claims against the lawfulness of the order, the district court on remand should grant summary judgment in favor of the government.

Reversed and remanded.

DISSENT:

ROGERS, *Circuit Judge*, dissenting: Under Executive Order 13201, a party, and all its subcontractors, contracting with the federal government must provide notice to its employees of their *Beck* and *General Motors* rights [1] or risk debarment. The Executive Order thus would regulate activities regarding union-security clauses, an area where the National Labor Relations Board has primary jurisdiction under the National Labor Relations Act ("NLRA"), and it would do so in a manner that imposes a duty on employers that the NLRA, as interpreted by the Board, does not impose.

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[1] *Communications Workers of Am. v. Beck*, 487 U.S. 735, 754-63 (1988); *see also NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 739-45 (1963).

Consequently, it is preempted under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and I respectfully dissent.

When the Supreme Court held in *Wisconsin Department of Industry v. Gould*, 475 U.S. 282 (1986), that a state statute debarring repeat NLRA offenders from doing business with the State was preempted by the NLRA, the Court explained that *Garmon* preemption prevents the States from "setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, [and] also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286. Concerned that there not be state standards that would interfere with Congress' "integrated scheme of regulation," the Court rejected the notion that "a supplemental remedy is different in kind from those that may be ordered by the Board" and would do no harm. *Id.* at 287. The focus, the Court explained, was on the activities, not the method of regulation. *Id.*

Union-security clauses and activities related to them fall squarely within the regulatory scope of the NLRA. *See* §§ 7, 8(a)(3), (b)(2), (f), 29 U.S.C. §§ 157, 158(a)(3), (b)(2), (f). The Supreme Court acknowledged that "federal concern is pervasive and its regulation complex" in this area, *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 296 (1971), and this court observed in *Thomas v. NLRB*, 341 U.S. App. D.C. 294, 213 F.3d 651 (D.C. Cir. 2000), that, as a consequence, "all the details necessary to make the rule of *Beck* operational were left to the Board, subject to the very light review authorized by *Chevron*." *Id.* at 657 (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1016 (7th Cir.), *cert. denied sub nom. Strang v. NLRB*, 525 U.S. 813 (1998)).

Executive Order 13201, by imposing a requirement on employers about what they must say in the context of union-

security clauses and establishing remedies for noncompliance, would shift these decisions away from the Board. This runs afoul of *Garmon*'s recognition of Congress' choice of the Board to implement the NLRA. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 225 (1993); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 (1985). The conflict that *Garmon* preemption seeks to avoid is evident by comparing the regulatory scheme envisioned in Executive Order 13201, with its posting requirement on penalty of debarment, and an employer's right under the NLRA, as interpreted by the Board in *Rochester Manufacturing Co.*, 323 N.L.R.B. 260 (1997), to speak or not to speak about *Beck* rights. In rejecting the General Counsel's position that the employer's failure to advise employees of *Beck* rights was an unfair labor practice, the Board in *Rochester Manufacturing* determined that under the NLRA the employer has no duty to inform its employees of their rights under *Beck*, declining to hold that an employer had an "affirmative obligation," comparable to the union's duty of fair representation, "to spell out for employees the precise extent of the union-security obligation." *Rochester Mfg.*, 323 N.L.R.B. at 262. Executive Order 13201, on the other hand, would force employers to surrender one of the speech options left open by the Board in *Rochester Manufacturing* or risk imposition of a draconian penalty, in conflict with the primary jurisdiction of the Board to decide whether an activity is lawful under §§ 7 and 8 of the NLRA, regardless of whether the Board has exercised its jurisdiction. *See Garmon*, 359 U.S. at 245; *Chamber of Commerce v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1337 n.10 (D.C. Cir. 1996); *see also Washington Serv. Contractors Coalition v. District of Columbia*, 311 U.S. App. D.C. 407, 54 F.3d 811, 815-16 (D.C. Cir. 1995). As the plaintiffs point out, the court has acknowledged the broad scope of preemption under *Garmon*, *see Chamber of Commerce*, 74 F.3d at 1334, and has rejected a crabbed conception of "consistency" and thus

any suggestion that the employer's foregoing one of two permissible options under Executive Order 13201 creates no *Garmon* conflict.

The court rejects this approach relying on *International Longshoremen's Association v. Davis*, 476 U.S. 380, 394-98 (1986). Opinion at 5. Because the Board rejected the position that non-posting of *Beck* rights was an unfair labor practice, it follows, the court says, that there is no basis to suggest that non-posting is "arguably" prohibited, for the Board in *Rochester Manufacturing* "has decided that the activity is not prohibited." Opinion at 6. But this is a sleight of hand, for the court's approach ignores the conflict that Executive Order 13201 would create with the regulatory scheme for union-security clauses that the Board has established, namely a scheme in which the employer may or may not inform its employees about *Beck* rights.

In rejecting the plaintiffs' alternative claim that Executive Order 13201 is preempted because it regulates activity protected or arguably protected by § 8(c), the court focuses on the hole in the donut and ignores the donut itself, stating that "fitting a *Garmon* claim under the language of § 8(c) is awkward." Opinion at 6. The Supreme Court in construing § 8(c) has adhered to the rationale of *Garmon* preemption, that "to leave the States [and non-Board actors] free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Garmon*, 359 U.S. at 244. Thus, in *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), the Supreme Court held that a state defamation statute was preempted in labor relations areas except where actual malice is found. *Id.* at 61. The Court explained that "the enactment of § 8(c) manifests a congressional intent to encourage free debate on issues dividing labor and management," and that limiting the applicability of the state statute to cases of actual malice

"guarded against abuse of libel actions and unwarranted intrusion upon free discussion envisioned by the Act." *Id.* at 62, 65.

The court finds ambiguity in *Linn*, Opinion at 7 & n.1, notwithstanding the fact that the *Linn* Court was clear that § 8(c) reflected Congress' goal of promoting robust and wide-open debate in the context of labor relations and that the application of state libel laws would interfere with this goal. *See Linn*, 383 U.S. at 62; *see also id.* at 58 n.3. While not expressly stating that *Garmon* preemption applied because § 8(c) protects an employer's free speech rights, this reasoning is implicit in *Linn*. To the extent there may be doubt, the Supreme Court has plainly spoken elsewhere that § 8(c) protects the employer's *First Amendment* right to express its views about unionism. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969). That *Linn* was only partially relying on § 8(c) has not deterred the Supreme Court from applying *Linn* to labor disputes "in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 279 (1974); *see id.* at 271-73, 276-79. In sum, the hole—arising from the fact that the language of § 8(c) protects employers's speech rights from the NLRA, *see* Opinion at 6-7—does not eviscerate the donut, which consists of the broad protection of employer speech under § 8(c), as is reflected in the Board's determination that as to *Beck* rights the employer has no duty under the NLRA to speak or not to speak.

Assuming protection of employer speech rights under § 8(c), the court concludes that Executive Order 13201's posting requirement is not unlike other federal posting requirements imposed on employers. Opinion at 7 (citing *Nat'l Elec. Mfrs. Ass'n v.* Sorrell, 272 F.3d 104, 113-16 (2d Cir. 2001); *Lake Butler Apparel Co. v. Sec'y of Labor*, 519 F.2d 84, 89 (5th Cir. 1975)). The plaintiffs do not claim that the employer's speech rights under § 8(c) are absolute; to the

contrary. Appellees' Br. at 29. But Executive Order 13201 is different from the posting requirements cited by the court. Unlike cases not within the regulatory authority of the Board where impositions on the employer's speech rights have been upheld, Opinion at 7, the courts have recognized that the implementation of *Beck* and *General Motor* rights is a matter "left to the Board." *See Thomas*, 213 F.3d at 657. The Board in *Rochester Manufacturing* preserved the employer's right under the NLRA to speak or not to speak on this issue. Like the state defamation law preempted in *Linn*, Executive Order 13201 would punish speech rights that Congress has protected under the NLRA, as interpreted by the Board, and thus would create unacceptable conflict with the Board's primary responsibility for activities relating to union-security clauses. Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 01CV00950 (HHK)

UAW-LABOR EMPLOYMENT AND TRAINING CORPORATION, *et al.*,
Plaintiffs,

v.

ELAINE CHAO,
Defendant.

January 2, 2002, Decided

JUDGES: Henry H. Kennedy, Jr., United States District Judge.

MEMORANDUM OPINION

Executive Order 13,201 ("Executive Order" or "Order") requires employers who have federal government contracts to post notices informing their employees of their rights not to join a union or pay certain union fees. Federal government contractors who do not comply face cancellation of their contracts and debarment from future government contracts. Contending that the Order is preempted by the National Labor Relations Act, 29 U.S.C. § 151 et seq., ("NLRA"), and was issued without authority, plaintiffs seek a declaration that the Order is invalid and to enjoin its continued implementation. Before the court are defendant's motion to dismiss and the parties' cross-motions for summary judgment. Upon consideration of the motions, the opposition thereto, and the record of the case, this court concludes that defendant's motions to dismiss and for summary judgment must be

denied. Also, because the Executive Order is preempted by the National Labor Relations Act, plaintiffs' motion for summary judgment and request for injunctive and declaratory relief must be granted.

I. FACTUAL BACKGROUND

Executive Order 13,201 was signed into law by the President on February 17, 2001, and became effective on April 18, 2001. The Order operates by requiring "all Government contracting departments and agencies" to include a number of clauses in "every Government contract" worth over $ 100,000 solicited after the Order's effective date. Order § 2(a). The first required clause mandates that the contractor post at its workplaces a notice that includes the following information:

> NOTICE TO EMPLOYEES
>
> Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter in a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.
>
> If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

> For further information concerning your rights you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional Offices or at the following address . . . [address printed].

Order § 2(a)(1).

The second and third contract clauses required by the Order authorize the Secretary of Labor to impose substantial penalties on those employer-contractors who do not post the above notice, including canceling their current government contracts and debarring them from obtaining future government contracts. *See* Order § 2(a)(2) & (3). The fourth required clause applies the notice requirement to sub-contractors and "those who sell goods to" prime contractors (i.e., vendors), and requires prime contractors to "take such action . . . as may be directed by the Secretary" towards subcontractors and vendors, including imposing sanctions for noncompliance with the Order. Order § 2(a)(4).

Although the Order authorizes the Secretary to exempt from the notice requirement those facilities of covered employers which "are in all respects separate and distinct from activities related to the performance of the contract," it states that "in the absence of an exemption *all* facilities shall be covered." Order § 3(c). The Secretary has not provided for any exemptions, and thus all the facilities of covered employers, even those without employees working under a federal contract covered by the Order, are required to post the notice.

As the source of its authority, the Order cites the Federal Property and Administrative Services Act, 40 U.S.C. §§ 471 et seq. ("Procurement Act"), which provides the President with the authority to issue executive orders to promote "economy and efficiency" in government procurement. The Order states its relationship to this goal as follows: "When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is

enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." Order § 1(a).

Challenging the Order are a non-profit corporation and three unions. The bylaws of the corporate plaintiff, UAW-Labor and Employment Training Corporation, states that its purpose is to "provide job training and jobs for eligible economically disadvantaged persons; . . . to obtain participation from private industry employers; and . . . to meet the specific needs of such employers." The Corporation claims it is an "employer" within the meaning of the NLRA and that it is party to several contracts with the federal government. The Corporation is also party to a collective bargaining agreement with the Office and Professional Employees International Union Local 537 ("OPEIU Local 537"), one of the union plaintiffs. This collective bargaining agreement is subject to a "union-security agreement," an agreement between an employer and a union providing that employees represented by the union are required to pay certain dues to the union as a condition of retaining employment.

Plaintiff International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") is an international labor organization that claims a membership of over 800,000 employees. UAW represents employees of federal government contractors, such as General Motors Corporation and Ford Motor Corporation, with which it has collective bargaining agreements that are subject to union-security agreements. Plaintiff OPEIU is an international labor organization that claims a membership of over 140,000 employees worldwide. Like UAW, it represents employees of federal government contractors with whom it has union-security agreements. Plaintiff OPEIU Local 537 is an OPEIU affiliate that represents the employees of the Corporation, with whom it has an union-security agreement.

II. ANALYSIS

A. Defendant's Motion to Dismiss

Defendant moves to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on the basis that plaintiffs lack standing to prosecute this action. Specifically, defendant argues that plaintiffs' averments in their complaint are insufficient to show that plaintiffs have been injured. Defendant's arguments are without merit.

Standing doctrine arises from the requirement in Article III of the Constitution that a "case or controversy" exist in order for federal courts to exercise jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing under Article III, a plaintiff must show: 1) injury in fact—a concrete and imminent violation of a legally protected interest; 2) causation—a causal connection between the challenged action and the injury in fact; and 3) redressability—the likelihood that a decision in the plaintiff's favor will redress the injury in fact. *See id.* at 560. These requirements, as with "any other matter upon which the plaintiff has the burden of proof," must be supported with "the manner and degree of evidence required" at the particular stage of litigation. *Id.* at 561. On a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice [to establish standing], for . . . we 'presume that general allegations embrace those specific facts that are necessary to support the claim'." *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990)). As with any motion to dismiss, "for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Chavous v. District of Columbia*, 154 F. Supp. 2d 40, 44 (D.D.C. 2001). The plaintiff need only

allege facts demonstrating "a realistic danger of . . . sustaining a direct injury." *Bristol-Myers Squibb Co. v. Shalala*, 320 U.S. App. D.C. 32, 91 F.3d 1493, 1497 (D.C. Cir. 1996) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Thus, as long as a plaintiff can allege facts, that, if true, would demonstrate a legally cognizable injury, then the court will not dismiss for want of standing.

The union plaintiffs allege that they have been injured by the Executive Order in two respects.[1] First, they argue that the notice required by the Order is likely to be viewed by employees as an attempt by employers to discourage participation in unions. Second, the unions contend that the Order removes their opportunity to bargain with employers over communications regarding employee rights and thus to modify the content of such communications or obtain other concessions.

1. Discouragement of Union Activity

Because employees are economically dependent on their employers, the unions argue, they are likely to interpret an official notice informing them that they do not have to join or pay certain fees to a union "not as a neutral statement regarding the NLRA's meaning and effect but as a pointed employer admonition to resign their union membership and to withdraw financial support from their union." Pl.'s Reply Memo. at 16. *See also* Supplemental Declaration of David Curson, UAW International President at 3. The unions point out that the notice required by the Order only notifies employees of their NLRA rights against unions, and not of their NLRA rights against employers, including their right to participate in union activity without employer interference.

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[1] Because the court concludes that the averments of the union plaintiffs are sufficient to withstand defendant's motion to dismiss, the court need not address the standing of the UAW-Labor and Employment Training Corporation.

The unions contend that employees will perceive this as an indication of employers' anti-union bias and thus feel pressured to disassociate themselves from unions.[2]

Defendant argues that this theory is flawed for two reasons. First, defendant observes that the unions have not identified individual employees who have resigned from a union or curtailed their payments of union fees because of the notice, and thus have failed to show actual injury. Second, defendant contends that even if the unions could show that employees resigned from unions due to the notice, they would not have standing because they are not and will never be "subject to" the Executive Order. In other words, defendant argues that the resignations would be due not to its actions but to those of an independent third party, the employer, because it is the employer who is regulated by the Order and who posts the notice. Therefore, defendant argues, the unions also have failed to show the causation and redressability elements of standing.

Defendant's arguments cannot be sustained. With respect to the significance defendant draws from the absence of evidence that employees have resigned from a union or curtailed their payments of union fees because of the notice, defendant misconstrues the showing necessary to establish standing at the pleading stage. To survive a motion to

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[2] Although the notice does not expressly direct employees to resign from or cease paying dues to their union, or make any other overtly anti-union statement, the Supreme Court has recognized that employees are prone to read such meanings into employer statements regarding unions. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which held that an employer's statements to its employees regarding unionization constituted an unfair labor practice under the NLRA, the Court noted that "any assessment of . . . employer expression [to employees] . . . must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* at 617.

dismiss, the unions need only allege facts which *if true* would show injury, and general allegations are assumed to "embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Not until the summary judgment stage—if the issue is raised—do plaintiffs have to "'set forth' by affidavit or other evidence 'specific facts'." *Id. at 561; see* Fed. Rule Civ. Proc. 56(e). The unions have satisfied the applicable burden by alleging that employees are likely to view the Order as an anti-union message from their employer, and therefore are likely to resign from or reduce their fees to their unions in the near future.[3] The unions do not have to include allegations that specific individuals have already resigned at this stage.[4]

As for defendant's argument that the resignation of union members would be due not to its actions but to those of an independent third party, this argument also results from an erroneous interpretation of governing law. Defendant's argument in this regard is based upon a distinction drawn by the Supreme Court in *Lujan v. Defenders of Wildlife* between parties who are "objects" of the action at issue, and parties whose injury "arises from the government's regulation . . . of *someone else*," a third party. 504 U.S. at 561. For parties who are objects of the action, there is "ordinarily little question" of injury, but for parties who are not, injury is ordinarily "substantially more difficult to establish" because they must show that the third party's "choices have been or will be

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[3] We note that only three employers who have union-security agreements with the plaintiff unions are known to have posted the notices, although plaintiffs contend that others intend to post the notices shortly. *See* Carson Dec. Thus, the Order's effect, whatever it may or may not be, has only begun to be felt by members of the plaintiffs' unions.

[4] The unions have submitted an affidavit from David Curson, International President of UAW, stating that the notice required by the Executive Order is likely to be understood by employees as an anti-union statement by employers. *See id.* at 3.

made in such manner as to produce causation and permit redressability of injury." 504 U.S. at 561-62. In *Lujan*, the Court held that the trial court was correct when it granted summary judgment to the defendant on the grounds that the plaintiff, a wildlife preservation organization, did not have standing on behalf of its members to challenge a Department of the Interior ("DOI") regulation. The challenged regulation required other federal agencies to consult with DOI to ensure that federally funded projects located in the United States complied with the Endangered Species Act, but did not require such consultation for federally funded projects located overseas. Because the regulation in *Lujan regulated* the activities of federal agencies, but was *challenged* by private citizens (who argued that the rule would deprive them of an opportunity to observe endangered species overseas), the distinction between parties who were objects of the action and those who were not was clear.

The distinction is not nearly as clear in this case. While it is the employer who must take the action mandated by the Executive Order—posting the notice—the content of the notice deals exclusively with the relations between unions and their members. As defendant acknowledges in its briefs, the Order is intended to "inhibit the unions from engaging in the practice of using union fees" improperly and to "protect employees from impermissible uses [by unions] of fees." *See* Def.'s Mot. at 3-4, 31-32. Thus, the Order targets union behavior and seeks to modify it. To argue that the union is nonetheless not an "object" of the rule because it is not technically "subject" to it—because it is not the one posting the notices—is to contort the principle underlying the distinction made in *Lujan*.

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court indicated that *Lujan* does not impose so rigid a construction. In *Bennett*, the plaintiff ranch owners challenged a Fish and Wildlife Service ("FWS") biological

opinion rendered pursuant to the Endangered Species Act on the basis that it would cause the Bureau of Reclamation ("Bureau"), a third party, to reduce their supply of water for irrigation. Citing *Lujan*, FWS argued that the plaintiffs lacked standing because any reduction in their water supply would be the result of action taken by the Bureau, not FWS. The Court rejected FWS's argument, finding that it had "wrongly equated injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Id.* at 170. The Court noted that while *Lujan* held that injuries resulting from "'the *independent* action of some third party not before the court'" were not sufficient for standing, "that does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Id.* (quoting *Lujan*, 504 U.S. at 560-61) (emphasis in original). The Court found that the biological opinion had such a "coercive effect" on the Bureau even though the Bureau was technically free to disregard it, because the Bureau ran a "substantial risk" of incurring substantial penalties if it did so without an adequate explanation. *See* 520 U.S. at 169-71. In this case, employers subject to the Executive Order are not free to disregard it, even in a "technical" sense, and the sanctions if they do are not a "risk" but a certainty. Thus the employers in this case are not "independent" third parties in the *Lujan* sense.[5]

2. *Removal of Bargaining Opportunity*

The unions argue that the Executive Order also injures them by removing their opportunity to bargain with employers over employers' communications to employees

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[5] *See also Motor & Equipment Manuf. Ass'n v. Nichols*, 330 U.S. App. D.C. 1, 142 F.3d 449 (D.C. Cir. 1998) (holding that sellers of car parts had standing to challenge EPA rule regulating automobile manufacturers because nearly all manufacturers had decided to comply with the rule, even though they were not required to and would not face sanctions if they did not, and compliance could reduce demand for sellers' parts).

regarding employee rights. If the Order did not mandate that the notice be posted, the unions contend, then they could have offered concessions to prevent employers from communicating such a message to employees or modify the message communicated so that it included notification of employees' rights against employers as well as their rights against unions.

Defendant counters that the alleged loss opportunity does not constitute an injury because unions would not otherwise have a right to bargain over such a notice. An employer's posting of such a notice, defendant argues, does not "significantly affect" a "term or condition of employment" such that collective bargaining is required under Section 8 of the NLRA. *See Seattle First Nat'l Bank v. NLRB*, 444 F.2d 30, 33 (9th Cir. 1971). However, nowhere does Section 8 state that a term or condition of employment must be "significantly affected" to activate the NLRA's requirement of collective bargaining, *see* 29 U.S.C.A. § 158(a)(1), (5), nor does any decision of the D.C. Circuit set forth such a test. Nor does defendant cite any case applying Section 8 to a notice like the one in this case. In fact, in the only case applying Section 8 cited by defendant for its facts, *NLRB v. Proof Co.*, 242 F.2d 560 (7th Cir. 1957), the Seventh Circuit held that use of company bulletin boards for union postings *is* a subject of mandatory collective bargaining under the NLRA. *See id.* at 562.

Defendant's argument regarding the scope of Section 8 is largely beside the point, however, because the unions maintain that even if bargaining was not *required* by the NLRA, they would have had the *opportunity* to bargain with employers over the notice. The Order therefore deprives them of an opportunity they would otherwise have had. This Circuit has recognized that a lost opportunity can supply the injury in fact necessary for standing. In *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 284 U.S. App. D.C. 1, 901 F.2d 107 (D.C.

Cir. 1990), the court held that the plaintiffs, two consumer associations, had standing to challenge fuel economy guidelines issued by the National Highway Safety Administration because the guidelines would reduce the incentive for automobile manufacturers to produce large passenger cars, thus reducing consumers' opportunities to buy such cars. The court found this lost opportunity to be "sufficiently personal and concrete to satisfy Article III requirements." 901 F.2d at 113.

Defendant counters that no opportunity would have existed in the first place in this case because, as the unions acknowledge, there was no general practice of employers posting a similar notice of their own accord prior to the issuance of the Order.[6] At the motion to dismiss stage, however, the unions do not have to identify specific employers who have conducted such bargaining in the past or would have done so in the future in the absence of the Order, it is sufficient to allege that the Order removes employers' incentive to so bargain. In *Center for Auto Safety v. National Highway Traffic Safety Administration*, 253 U.S. App. D.C. 336, 793 F.2d 1322 (D.C. Cir. 1986), another, case involving a challenge by consumers to fuel-efficiency regulations, the D.C. Circuit held that the plaintiffs had standing even though they did not allege that the availability of fuel efficient vehicles had already changed due to the new regulations, but

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[6] Employers have, however, engaged in bargaining over their communications to employees regarding unions, and have agreed not to exercise their NLRA right to advocate against unions in exchange for union concessions. *See Hotel Employees Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992). The value to unions of striking such a bargain has been diminished due to the Order, as employers can still accomplish through the required notice what they bargain away. Thus, the unions may have lost a bargaining opportunity even as to employers who would not otherwise post such a notice.

only that the regulations would reduce the availability of such vehicles in the future. *See id.*, 793 F.2d at 1332.[7]

B. NLRA Preemption

Plaintiffs and defendant have both moved for summary judgement on the question of whether the Executive Order is preempted under the NLRA.[8] Plaintiffs contend that the Executive Order is preempted by the NLRA because it regulates in a field in which the NLRA as construed by the National Labor Relations Board ("NLRB") precludes Procurement Act regulation, including presidential executive orders. Defendant argues the opposite position.

The foundation for plaintiffs' argument is the D.C. Circuit's decision in *Chamber of Commerce v. Reich*, 316 U.S.

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[7] Defendant also argues that because unions themselves have an existing obligation under the NLRA to inform employees of their *Beck* and *General Motors* rights, the unions cannot claim to have suffered harm from a notice that provides employees with the same information. It is not the information contained in the notice per se that the unions claim causes their injury, however, but the source of that information. Information communicated on a notice posted by employers, the unions contend, has a different impact on employees than information coming from the unions. The former is likely to be perceived as indicating an employer's anti-union bias, while the latter is not. Moreover, when the information is conveyed by the unions pursuant to their NLRA obligations, it is likely to be supplemented by information on the positive rights of employees regarding unions, rights which the notice does not mention. Thus, the unions' NLRA obligations do not prevent them from being harmed by the Order.

[8] The court applies the well recognized standards governing motions for summary judgment. Summary judgement should not be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgement as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby*, 477 U.S. 242, 248-49 (1986). Here, because the issue of preemption is a pure question of law, it is ripe for summary judgement. *Swan v. Clinton*, 321 U.S. App. D.C. 359, 100 F.3d 973, 976 (D.C. Cir. 1996). The court observes that defendant does not raise the issue of plaintiffs' standing in its motion for summary judgment.

App. D.C. 61, 74 F.3d 1322 (D.C. Cir. 1996). In *Chamber of Commerce*, the court invalidated as preempted by the NLRA Executive Order 12,954, an Executive Order issued under the Procurement Act that debarred from federal government contracts employers who hired permanent replacement workers during a strike. The court held that the order was in "unacceptable conflict" with the NLRA because the NLRA does not prohibit hiring permanent striker replacements. 74 F.3d at 1333. The government argued that the order did not conflict with the NLRA because the NLRA does not require employers to hire permanent striker replacements; i.e., because the order did not *prohibit* conduct the NLRA requires. *See* 74 F.3d at 1330. The court rejected the government's argument, finding its definition of conflict too narrow to comport with the broad-sweeping NLRA preemption rule laid down by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). *See Chamber of Commerce*, 74 F.3d at 1337-39.[9]

The *Garmon* rule holds that the NLRA preempts laws regulating any activity that is "arguably" protected or prohibited under the NLRA, not merely activities expressly protected or prohibited by the statute. *See Garmon*, 359 U.S. at 244. This rule bars state and federal regulators both from setting their own standards for conduct regulated by the NLRA and from providing their own remedies for such conduct. *See Wisconsin Dep't of Indus. v. Gould*, 475 U.S.

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[9] Defendant argues that the *Chamber of Commerce* ruling was based not on the *Garmon* preemption rule but on the preemption rule laid down by the Supreme Court in *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). "Machinists preemption" prohibits regulation in an area that Congress intended to be unregulated and left to the free play of the market. *See Chamber of Commerce*, 74 F.3d at 1334. The *Chamber of Commerce* court very clearly stated, however, that the Executive Order under consideration ran "afoul not only of *Machinists* but . . . Garmon preemption doctrine." 74 F.3d at 1338.

282, 286 (1986); *Chamber of Commerce*, 74 F.3d at 1334. The *Garmon* rule is thus designed to avert "conflict in the broadest sense" with the NLRA's "complex and interrelated . . . scheme of law, remedy, and administration." *Garmon*, 359 U.S. at 243; *Chamber of Commerce*, 74 F.3d at 1333 (quoting *Garmon*).

Plaintiffs argue that the Executive Order in this case, like that in *Chamber of Commerce*, conflicts with the NLRA in the broad *Garmon* sense because it sets a different standard of conduct for employers than that set by the NLRA. Plaintiffs base this argument on *Rochester Manufacturing Co. v. NLRB*, 323 N.L.R.B. 260 (1997), in which the NLRB, the administrative body charged with interpreting and adjudicating NLRA rights, held that the NLRA does not require employers to post notices informing workers of their rights under *Beck* and *General Motors*. Plaintiffs thus argue that just as the Executive Order in *Chamber of Commerce* was preempted because it prohibited conduct the NLRA does not prohibit, the Order in this case is preempted because it requires conduct the NLRA does not require.

Defendant attacks plaintiffs' argument on two grounds. First, it contends that the Executive Order is not preempted by the NLRA because the NLRA does not prohibit employers from posting notices of the relevant employee rights. *Rochester Manufacturing*, defendant points out, held merely that employers cannot be required to post such notices under the NLRA, not that they could not do so. In fact, defendant argues, employers have an affirmative right to post such notices under Section 8 of the NLRA, the provision of the statute protecting employer expression. *See* 29 U.S.C. § 158(c). Defendant reasons that if the Order does not require conduct that the NLRA prohibits, and if employers would be free to post notices even in its absence, it cannot conflict with the NLRA.

While defendant's statements of the law under *Rochester Manufacturing* and Section 8 of the NLRA are correct, its reasoning is not. The question is not whether the NLRA prohibits employers from posting *Beck/General Motors* notices—defendant is correct that it does not—but whether the NLRA prohibits *requiring* employers to post the notices. *Rochester Manufacturing* makes clear that it does. Therefore, an employer who refrains from posting the notice complies with the NLRA, but violates the Executive Order—just as an employer in *Chamber of Commerce* who hired permanent replacement workers complied with the NLRA, but violated the Clinton order. This is a clear conflict under the *Garmon* rule.[10] Defendant's argument is simply the corollary to the argument rejected by the D.C. Circuit in *Chamber of Commerce*, and fails because it depends on the same narrow notion of conflict.

Any remaining doubt as to the outcome of applying *Chamber of Commerce* to the facts of this case is erased by that court's own statement that it would rule the same way if asked to pass on an executive order exactly like the one at issue here. Referring to Executive Order 12,800, an order issued by former President Bush and repealed by then President Clinton prior to the court's ruling, the court stated,

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[10] The only other court to consider whether a regulation that requires employers to do something that the NLRA does not require them to do is preempted by the NLRA reached the same conclusion. In *Aeroground, Inc. v. City and County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001), the Northern District of California held that a regulation requiring employers to recognize a union based on union authorization cards signed by a majority of employees was preempted under the NLRA, because the NLRA allows—but does not require employers to refrain from such recognition pending an election conducted by the NLRB. The court found that the regulation "set forth standards inconsistent with the substantive requirements of the NLRA" by imposing a requirement that "conflicts with . . . options for employers that are protected by the NLRA." 170 F. Supp. 2d at 956.

"We also are dubious that [Bush's order], which required government contractors to post notices informing their employees that they could not be required to join or remain a member of union, was legal. It may well have run afoul of *Garmon* preemption which reserves to NLRB jurisdiction arguably protected or arguably prohibited conduct." *Id.*, 74 F.3d at 1337 n.10.

Next, defendant contends that even if the Executive Order would be preempted under *Garmon* doctrine, NLRA preemption does not apply to this case because the Order "implicates" the unions' duty of fair representation. The duty of fair representation requires unions that are parties, to union security agreements to provide fair representation to all employees when conducting collective bargaining with employers, regardless of whether a particular employee is a union member. *See Communications Workers of Am. v. Beck*, 487 U.S. 735, 742-44. As part of this duty, unions must inform employees of their right not to join or pay certain fees to a union. Defendant argues that because the order advises employees of these same rights, it implicates the unions' duty of fair representation. Since the NLRB does not have exclusive primary jurisdiction over duty of fair representation claims, *see id.; Vaca v. Sipes*, 386 U.S. 171 (1967), defendant concludes that the Order is not governed by *Garmon* or *Rochester Manufacturing* and therefore is not preempted by the NLRA.

There are two major flaws in this reasoning. First, the fact that actions to enforce the duty of fair representation do not have to be adjudicated by the NLRB before being heard in state court does not mean that attempts to regulate this duty are not preempted by the NLRA. In fact, numerous cases have held that, although they may be heard in state court in the first instance, state law duty of fair representation claims *are* preempted. *See, e.g., BIW Deceived v. Local S6*, 132 F.3d 824, 830 (1st Cir. 1997); *In re Glass Workers Local No. 173*,

983 F.2d 725, 729 (6th Cir. 1993). In addition, insofar as this case deals with *employers'* obligations under the NLRA, the section of the NLRA setting forth employers' obligations (Section 8) is separate from the section setting forth unions' duty of fair representation (Section 9), and therefore the jurisdictional rules applying to the latter may not apply to the former. In *Nielsen v. International Association of Machinists*, 94 F.3d 1107 (7th Cir. 1996), the only case on point, the Seventh Circuit held that the NLRB *does* have exclusive primary jurisdiction over the question of whether the NLRA requires employers to notify employees of their *Beck* and *General Motors* rights. Therefore, the NLRB's decision in *Rochester Manufacturing* governs.

Second and more importantly, this case is not a duty of fair representation claim. Such claims are brought by an *employee* against a *union* to force the union to comply with its duty of fair treatment. As the Supreme Court has noted, this duty serves "as a bulwark to prevent arbitrary *union* conduct against *individuals*," and it is because of this public policy goal that such claims are not left solely to the NLRB to prosecute. *Vaca*, 386 U.S. at 181-83 (emphases added). This case involves a challenge by *unions* and *employers* to a government regulation; the fact that the regulation requires employers to post a notice of certain employee rights, of which unions must also notify employees pursuant to the duty of fair representation, does not confer that duty onto employers or transform this case into a duty of representation claim. The cases cited by defendant, all claims by individual employees against unions, are therefore inapposite.

In sum, the Executive Order would regulate in a core labor-management area regulated by the NLRA by imposing a duty on employers that the NLRA, as construed by the NLRB, does not impose. Therefore, the Order is in conflict with the

NLRA and is preempted by it under *Garmon* and *Chamber of Commerce*.[11]

III. CONCLUSION

For the foregoing reasons, the court denies defendant's motions to dismiss and for summary judgment, and grants plaintiffs' motion for summary judgment and requests for a permanent injunction and declaratory judgment. An appropriate order accompanies this memorandum opinion.

Henry H. Kennedy, Jr.
United States District Judge

Date: 1-2-02

ORDER AND JUDGMENT

1. Pursuant to Fed. R. Civ. P. 58, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 2nd day of January, 2002, hereby

ORDERED that Executive Order 13,201 is invalid and of no force and effect; and it is further

ORDERED that defendant is permanently enjoined from implementing and enforcing Executive Order 13,201.

Henry H. Kennedy, Jr.
United States District Judge

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[11] There is no need to address plaintiffs' additional claim that the Executive Order is invalid under the Procurement Act, because even if the court were to find for defendant on that claim, it would still hold the Order invalid under the NLRA. *See Chamber of Commerce*, 74 F.3d at 1333 (rejecting the argument that the Procurement Act "trumps" the NLRA such that a finding that an Order is valid under the former obviates the need to assess its validity under the latter).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5080

UAW-LABOR EMPLOYMENT AND
TRAINING CORPORATION, *et al.*,
Appellees,

v.

ELAINE CHAO, SECRETARY OF LABOR, *et al.*,
Appellants.

September 11, 2003, Decided

BEFORE: GINSBURG, *Chief Judge*, and EDWARDS,* SENTELLE, HENDERSON, RANDOLPH, ROGERS,* TATEL, GARLAND, and ROBERTS, *Circuit Judges*.

ORDER

Appellees' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

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* Circuit Judges Edwards and Rogers would grant the petition for rehearing en banc.

APPENDIX D

PRESIDENT OF THE UNITED STATES

Executive Order 13201 of February 17, 2001

Title 3 -

The President

Notification of Employee Rights Concerning Payment of Union Dues or Fees

Part III

DATE: Thursday, February 22, 2001

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, and in order to ensure the economical and efficient administration and completion of Government contracts, it is hereby ordered that:

Section 1. (a) This order is designed to promote economy and efficiency in Government procurement. When workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced. The availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts.

(b) The Secretary of Labor (Secretary) shall be responsible for the administration and enforcement of this order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of this order.

Sec. 2. (a) Except in contracts exempted in accordance with section 3 of this order, all Government contracting departments and agencies shall, to the extent consistent with law, include the following provisions in every Government

contract, other than collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8) and purchases under the "Simplified Acquisition Threshold" as defined in the Office of Federal Procurement Policy Act (41 U.S.C. 403).

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice shall include the following information (except that the last sentence shall not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151-188)):

"NOTICE TO EMPLOYEES

Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

"If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

"For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address:

National Labor Relations Board
Division of Information
1099 14th Street, N.W.
Washington, D.C. 20570

"To locate the nearest NLRB office, see NLRB's website at www.nlrb.gov."

"2. The contractor will comply with all provisions of Executive Order 13201 of February 17, 2001, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13201 of February 17, 2001. Such other sanctions or remedies may be imposed as are provided in Executive Order 13201 of February 17, 2001, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (3) herein in every subcontract or purchase order entered into in connection with this contract unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13201 of February 17, 2001, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of

sanctions for non compliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

(b) Whenever, through Acts of Congress or through clarification of existing law by the courts or otherwise, it appears that contractual provisions other than, or in addition to, those set out in subsection (a) of this section are needed to inform employees fully and accurately of their rights with respect to union dues, union-security agreements, or the like, the Secretary shall promptly issue such rules, regulations, or orders as are needed to cause the substitution or addition of appropriate contractual provisions in Government contracts thereafter entered into.

Sec. 3. (a) The Secretary may, if the Secretary finds that special circumstances require an exemption in order to serve the national interest, exempt a contracting department or agency from the requirements of any or all of the provisions of section 2 of this order with respect to a particular contract, subcontract, or purchase order.

(b) The Secretary may, by rule, regulation, or order, exempt from the provisions of section 2 of this order certain classes of contracts to the extent that they involve (i) work outside the United States and do not involve the recruitment or employment of workers within the United States; (ii) work in jurisdictions where State law forbids enforcement of union-security agreements; (iii) work at sites where the notice to employees described in section 2(a) of this order would be unnecessary because the employees are not represented by a union; (iv) numbers of workers below appropriate thresholds set by the Secretary; or (v) subcontracts below an appropriate tier set by the Secretary.

(c) The Secretary may provide, by rule, regulation, or order, for the exemption of facilities of a contractor, subcontractor, or vendor that are in all respects separate and distinct from activities related to the performance of the contract: Provided, that such exemption will not interfere with or impede the effectuation of the purposes of this order: And provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this order.

Sec. 4. (a) The Secretary may investigate any Government contractor, subcontractor, or vendor to determine whether the contractual provisions required by section 2 of this order have been violated. Such investigations shall be conducted in accordance with procedures established by the Secretary.

(b) The Secretary shall receive and investigate complaints by employees of a Government contractor, subcontractor, or vendor where such complaints allege a failure to perform or a violation of the contractual provisions required by section 2 of this order.

Sec. 5. (a) The Secretary, or any agency or officer in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, regarding compliance with this order as the Secretary may deem advisable.

(b) The Secretary may hold hearings, or cause hearings to be held, in accordance with subsection (a) of this section prior to imposing, ordering, or recommending the imposition of sanctions under this order. Neither an order for debarment of any contractor from further Government contracts under section 6(b) of this order nor the inclusion of a contractor on a published list of noncomplying contractors under section 6(c) of this order shall be carried out without affording the contractor an opportunity for a hearing.

Sec. 6. In accordance with such rules, regulations, or orders as the Secretary may issue or adopt, the Secretary may:

(a) after consulting with the contracting department or agency, direct that department or agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor to comply with the contractual provisions required by section 2 of this order; contracts may be cancelled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon future compliance: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of the contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that completion of the contract is essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of the contracting department or agency continues personally to object to the issuance of such directive;

(b) after consulting with each affected contracting department or agency, provide that one or more contracting departments or agencies shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary that such contractor has complied with and will carry out the provisions of this order: Provided, that before issuing a directive under this subsection, the Secretary shall provide the head of each contracting department or agency an opportunity to offer written objections to the issuance of such a directive, which objections shall include a complete statement of reasons for the objections, among which reasons shall be a finding that further contracts or extensions or other modifications of

existing contracts with the noncomplying contractor are essential to the agency's mission: And provided further, that no directive shall be issued by the Secretary under this subsection so long as the head of a contracting department or agency continues personally to object to the issuance of such directive; and

(c) publish, or cause to be published, the names of contractors that have, in the judgment of the Secretary, failed to comply with the provisions of this order or of related rules, regulations, and orders of the Secretary.

Sec. 7. Whenever the Secretary invokes section 6(a) or 6(b) of this order, the contracting department or agency shall report the results of the action it has taken to the Secretary within such time as the Secretary shall specify.

Sec. 8. Each contracting department and agency shall cooperate with the Secretary and provide such information and assistance as the Secretary may require in the performance of the Secretary's functions under this order.

Sec. 9. The Secretary may delegate any function or duty of the Secretary under this order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Sec. 10. The Federal Acquisition Regulatory Council (FAR Council) shall take whatever action is required to implement in the Federal Acquisition Regulation (FAR) the provisions of this order and of any related rules, regulations, or orders of the Secretary that were issued to implement this Executive Order. The FAR Council shall amend the FAR to require each solicitation of offers for a contract to include a provision that implements section 2 of this order.

Sec. 11. As it relates to notification of employee rights concerning payment of union dues or fees, Executive Order

12836 of February 1, 1993, which, among other things, revoked Executive Order 12800 of April 13, 1992, is revoked.

Sec. 12. The heads of executive departments and agencies shall revoke expeditiously any orders, rules, regulations, guidelines, or policies implementing or enforcing Executive Order 12836 of February 1, 1993, as it relates to notification of employee rights concerning payment of union dues or fees, to the extent consistent with law.

Sec. 13. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it, create any right to administrative or judicial review, or any right, whether substantive or procedural, enforceable by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 14. The provisions of this order shall apply to contracts resulting from solicitations issued on or after the effective date of this order.

Sec. 15. This order shall become effective 60 days after the date of this order.

/s/ George W. Bush
THE WHITE HOUSE,

February 17, 2001

Supreme Court, U.S.
FILED
MAR 12 2004
OFFICE OF THE CLERK

(2)

No. 03-858

In the Supreme Court of the United States

UAW-LABOR EMPLOYMENT AND TRAINING CORPORATION, ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Executive Order 13201 requires federal contractors to post a government notice that informs employees that they cannot be required to join a union or to pay union fees for purposes other than representational activities. The question presented is whether Executive Order 13201 is invalid under the doctrine of preemption articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which bars state and local regulation of activities that are arguably protected under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, or that are arguably prohibited under Section 8 of that Act, 29 U.S.C. 158.

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In the Supreme Court of the United States

No. 03-858

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ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 325 F.3d 360. The opinion of the district court (Pet. App. 16a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2003. A petition for rehearing was denied on September 11, 2003 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 22, 2001, the President promulgated Executive Order 13201, 66 Fed. Reg. 11221, "in order to

ensure the economical and efficient administration and completion of Government contracts." Pet. App. 36a. The Executive Order provides that certain federal procurement contracts are to contain a provision requiring the contractor to post a government notice informing its employees of the rights recognized by this Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), and *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988). (These rights are commonly referred to as "*Beck* rights.") In particular, the notice is to inform employees (1) that they may not be required to join a union as a condition of employment, and (2) that, although they may be required to pay uniform periodic dues and initiation fees for collective bargaining, contract administration, and grievance adjustment, they may not be required to pay for other union activities. Pet. App. 37a.[1]

The President issued Executive Order 13021 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. 471 *et seq.*; Act of Aug. 21, 2002, Pub. L. No. 107-217, 116 Stat. 1062 (to be codified at 40 U.S.C. 101 *et seq.*) (codification of Title 40, United States Code). See Pet. App. 36a. The Procurement Act authorizes the President to set "policies and directives that [he] considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and supply. 40

[1] Executive Order 13201 specifies the text of the notice that contractors are to post. See Pet. App. 37a-38a. Under implementing regulations proposed by the Department of Labor, the government will supply posters containing the mandated information, and contractors must display the official posters or exact duplicates. 66 Fed. Reg. 50,011 (2001).

U.S.C. 471, 486(a). In the Executive Order, the President explained that, "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced." Pet. App. 36a. The President added that "[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Ibid.*

All contractors working under government procurement contracts of $100,000 or more are required to post the notice. Pet. App. 36a-37a; see 41 U.S.C. 403(11). Subcontractors and vendors working under the contract must also post the notice. Pet. App. 38a-39a. The Secretary of Labor may exempt certain contracts, classes of contracts, or facilities from the posting requirement. *Id.* at 39a-40a. The posting requirement applies only "to the extent consistent with law." *Id.* at 36a.

If a contractor fails to post the notice, its contract may be suspended or terminated. Pet. App. 41a. The contractor may also be barred from future contracts until it "has satisfied the Secretary that [it] has complied with and will carry out the provisions of th[e] order." *Ibid.*

2. Petitioners, three unions and a non-profit organization that provides job training and placement services, are parties to collective bargaining agreements that include union-security agreements that require employees to pay union dues as a condition of employment. Petitioners brought this action against the Secretary of Labor and the members of the Federal Acquisition Regulatory Council to challenge the validity of Executive Order 13201. They principally contended that the Executive Order is preempted by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*,

under the doctrine articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). See Pet. App. 2a; C.A. App. 11, 13-15, 20-22.[2]

On cross-motions for summary judgment, the district court held that Executive Order 13201 is invalid under the *Garmon* preemption doctrine. The court recognized that the *Garmon* doctrine preempts state and local regulation of activities that arguably are protected by Section 7 of the NLRA, 29 U.S.C. 157, or that arguably are prohibited as unfair labor practices under Section 8 of the NLRA, 29 U.S.C. 158. Pet. App. 29a. The court also recognized that the conduct required of federal contractors by the Executive Order is neither protected under Section 7 nor prohibited under Section 8. *Id.* at 31a. The court nonetheless held that the *Garmon* doctrine applies. The court noted that the National Labor Relations Board (NLRB) has ruled that employers are permitted, but not required, under the NLRA to notify employees of their *Beck* rights. *Ibid.* (citing *Rochester Manufacturing Co.* v. *NLRB*, 323 N.L.R.B. 260 (1997), enforced, 194 F.3d 1311 (6th Cir. 1999) (Table), cert. denied, 529 U.S. 1066 (2000)). The court viewed the *Garmon* doctrine as preventing the President from imposing on federal contractors any requirement relating to labor relations that the NLRB has declined to impose on employers generally. *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-15a.

The court of appeals held that Executive Order 13201 is valid under the *Garmon* doctrine because the Executive Order does not require conduct that is either

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[2] Petitioners also argued that the President lacked the authority under the Procurement Act to issue Executive Order 13201. See Pet. App. 2a. The court of appeals rejected that argument (*id.* at 9a-10a), and petitioners do not renew it here. See Pet. 6 n.3.

protected or prohibited by the NLRA. The court of appeals, like the district court, noted the NLRB's ruling in *Rochester Manufacturing* that employers are not required to post notices of employees' *Beck* rights. Unlike the district court, however, the court of appeals understood that *Rochester Manufacturing* excludes the conduct required by Executive Order 13201 from the scope of *Garmon* preemption. Pet. App. 4a. The court explained that the *Garmon* doctrine "operate[s] only as to activities arguably protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." *Id.* at 4a-5a.

The court of appeals rejected the argument that *Garmon* preemption applies because the NLRB might someday change its position and require employers to notify employees of their *Beck* rights. Pet. App. 5a. The court adhered to this Court's instruction that it is the NLRB's "*actual decision* [that] controls" in determining whether conduct is arguably protected or arguably prohibited under the NLRA. *Ibid.* (quoting *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 397 (1986)).[3]

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[3] In addition, the court of appeals rejected the argument, which petitioners do not renew here, that Section 8(c) of the NLRA protects an employer's right not to post notices of *Beck* rights and that Executive Order 13201 does, therefore, regulate conduct that is protected by the NLRA. See 29 U.S.C. 158(c) ("The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."). The court of appeals concluded that the expressive activities described in Section 8(c) "are not 'protected *by*' the NLRA, except from the NLRA itself." Pet. App. 6a. The court further concluded that, even if *Garmon* preemption were to apply to the activities described in Section

Judge Rogers, in dissent, maintained that Executive Order 13201 is invalid under the *Garmon* doctrine. Pet. App. 10a-15a. She reasoned that the Executive Order involves an area in which the NLRB "has primary jurisdiction" and imposes a "duty on employers that the NLRA, as interpreted by the Board, does not impose." *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, because this case involves a challenge to an Executive Order of the President, not to a state or local regulation, the case would not be a suitable vehicle in which to consider the general preemption questions that petitioners raise. This Court's review is therefore unwarranted.

1. The court of appeals correctly concluded that Executive Order 13201 is valid under the doctrine of NLRA preemption recognized in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which "forbids state and local regulation of activities that are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) (quoting *Garmon*, 359 U.S. at 244). The *Garmon* doctrine thus serves to "protect[] the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or

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8(c), that provision does not afford employers an affirmative right of silence that prevents them from being required to post notices of *Beck* rights. *Id.* at 7a.

protected by the NLRA." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748 (1985).[4]

Executive Order 13201 does not involve conduct that is arguably "protected by § 7," which governs the rights of employees. See 29 U.S.C. 157. When employers post a government notice that accurately informs employees of their rights under federal labor law, their employees remain free to organize, bargain collectively, and engage in other concerted activities, as well as to refrain from doing so.

Nor does Executive Order 13201 involve conduct that is arguably "prohibited by § 8," which bars employers and labor organizations from interfering with employees' exercise of Section 7 rights. See 29 U.S.C. 158. As the court of appeals recognized, and petitioners do not dispute (see Pet. 6), Section 8 neither requires employers to notify employees of their *Beck* rights nor prohibits employers from doing so. See Pet. App. 4a-5a, 7a. Accordingly, the court of appeals was correct that the Executive Order is not invalid under the *Garmon* doctrine, which "operat[es] only as to activities arguably

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[4] This Court recognized a separate NLRA preemption doctrine in *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which prohibits "state and municipal regulation of areas that have been left 'to be controlled by the free play of economic forces.'" *Building & Constr. Trades Council*, 507 U.S. at 223 (quoting *Machinists*, 427 U.S. at 140). Under the *Machinists* doctrine, "the legislative purpose may * * * dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." *Machinists*, 427 U.S. at 141 (quoting *Hanna Mining Co.* v. *Marine Eng'rs*, 382 U.S. 181, 187 (1965)). Petitioners have not argued for application of *Machinists* preemption in this case. Pet. App. 3a.

protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." Pet. App. 5a.[5]

2. There is no merit to petitioners' contention that Executive Order 13201 creates preemptive "conflict" under *Garmon* by requiring federal contractors to engage in conduct that the NLRB assertedly could have regulated, but did not. See Pet. 8-9. *Garmon* itself recognizes that, when the NLRB has "decide[d] that an activity is neither protected nor prohibited" by the NLRA, state or local regulation of the activity is not preempted under the principles articulated in that case. 359 U.S. at 245; see *id.* at 246 (explaining that preemption does not apply when the NLRB has made a "clear determination" that the NLRA does not protect or prohibit an activity). The necessary implication is that the President, in the exercise of his authority under the Procurement Act, is not barred under the *Garmon* doctrine from addressing conduct that the NLRB itself has determined is neither required nor prohibited by the NLRA (even assuming that the

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[5] To the extent that petitioners rely (Pet. 18) on a quotation from the NLRB's brief in *Chamber of Commerce* v. *Lockyer*, No. 03-55166 (9th Cir. argued Sept. 12, 2003), petitioners' reliance is misplaced. *Lockyer* involves an NLRA preemption challenge to a state law prohibiting certain employers from using state funds to promote or deter union organizing by their employees. In its amicus brief in that case, the NLRB primarily relied on the *Machinists* doctrine (see note 4, *supra*) in support of its view that the state statute at issue is preempted. In the portion of that brief that addressed *Garmon* preemption, the NLRB expressly explained that there was no inconsistency between its position in *Lockyer* and the D.C. Circuit's application of *Garmon* in this case, because the D.C. Circuit found that the conduct required by Executive Order 13201 was neither arguably protected by Section 7 nor arguably prohibited by Section 8, whereas the state statute in *Lockyer* regulates conduct arguably prohibited by Section 8.

Garmon doctrine applies to actions of the President authorized by another Act of Congress).

Subsequent decisions of this Court reinforce that understanding. In *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986), which concerned whether the *Garmon* doctrine barred a tort suit in state court against a union, the Court explained that, if "there is an arguable case for pre-emption," a court "must defer to the [NLRB]." *Id.* at 397. If, on the other hand, an arguable case for preemption would exist but the NLRB has "decide[d] that the conduct is not protected or prohibited," then a court "may * * * entertain the litigation." *Ibid.* And, in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), which concerned whether a trespass suit against a union was preempted under *Garmon*, the Court observed that a state court is not precluded from entertaining a challenge to such conduct, if "the state court can ascertain the actual legal significance of [the] conduct under federal law by reference to 'compelling precedent applied to essentially undisputed facts.'" *Id.* at 188-189 n.13 (quoting *Garmon*, 359 U.S. at 246).

Petitioners' sweeping theory of "field" preemption would expand the *Garmon* doctrine to all matters except those the NLRB has determined are entirely beyond the concern of the NLRA. Nothing in *Garmon* itself—or in any other decision of this Court concerning *Garmon* preemption—supports that result. Nor does petitioner's theory make any logical sense. The question whether the NLRA applies at all, like the question how the NLRA applies, is within the NLRB's primary authority.

3. Petitioners contend that the court of appeals' decision could "lead[] to a pattern of shifting" outcomes

if the NLRB were first to conclude that the NLRA permits, but does not require, particular conduct and were later to conclude that the conduct is required or prohibited. Pet. 9.[6] Such an outcome is not "senseless," as petitioners assert (*ibid.*), but is the natural result of a legal system that gives agencies broad latitude to interpret their own organic statutes, see, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-846 (1984); that permits agencies to modify their interpretations, see, *e.g.*, *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351 (1978); and that accords preemptive force to such interpretations, see, *e.g.*, *New York* v. *FERC*, 535 U.S. 1, 18-20 (2002). Under ordinary principles of conflict preemption, a federal regulation preempts a conflicting state rule, even if the regulation is newly adopted and the agency's prior position did not preempt the state rule. See, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 886 (2000); *City of New York* v. *FCC*, 486 U.S. 57, 66-70 (1988). The court of appeals' application of *Garmon* is thus consistent with settled principles of preemption by administrative action.[7]

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[6] The NLRB currently has before it two rulemaking petitions on whether employers should be required to post notices of *Beck* rights or more expansive notices advising employees of their federal rights and obligations under the NLRA. The pendency of those petitions, which will afford the NLRB the opportunity to reexamine the issues decided in *Rochester Manufacturing*, provides additional reason not to grant review in this case.

[7] Although petitioners suggest (Pet. 8-10, 12-14) that the court of appeals' interpretation of *Garmon* would authorize States generally to regulate matters that the NLRB has determined are permitted but not required under the NLRA, petitioners fail to acknowledge that *Garmon* is not the sole preemption doctrine under which such state regulation could be challenged. Under the doctrine of *Machinists* preemption, for instance, state regulation is

4. This case would be a peculiarly inappropriate vehicle to address the general scope of *Garmon* preemption because the case does not involve preemption at all. Executive Order 13201 was issued by the President of the United States pursuant to an express grant of authority in the Procurement Act to set policies for efficient and economical government contracting and supply. See 40 U.S.C. 471, 486(a). Petitioners do not challenge the court of appeals' holding that Executive Order 13201 constitutes a valid exercise of the President's authority under the Procurement Act. See note 2, *supra*. Thus although the NLRA vests administrative authority in the NLRB, the Procurement Act vests the President with the authority to establish policies—specifically including the one at issue here—concerning proprietary matters for the Executive Branch, and Article II of the Constitution vests the President with the authority to direct officers of the Executive Branch in performing their duties under the various laws that they are charged with administering. Those distinct grants of authority under federal law can and should be read harmoniously. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995).

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preempted in certain circumstances in which *Garmon* preemption does not apply. See note 4, *supra*. Thus, contrary to petitioners' argument (Pet. 12-13), whether an employer recognizes a union based on the union's having collected authorization cards from a majority of the employees or, instead, insists that the union prove its majority status through an NLRB-conducted election is a choice that, because left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA (see *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301 (1974)), may be insulated from conflicting state regulation on non-*Garmon* grounds. See *Machinists*, 427 U.S. at 141.

Because crucial distinctions exist between an Executive Order of the President governing federal procurement, on the one hand, and a state or local regulation, on the other, petitioners' assertions about the implications of the court of appeals' decision for cases involving state or local regulations are speculative. See Pet. 17-18. Nor do petitioners even suggest that any circuit conflict exists on the question presented here. The only decision of another circuit that involved a similar issue—*Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 175 (3d Cir.), cert. denied, 404 U.S. 854 (1971)—is fully consistent with the decision in this case. There, the Third Circuit held that the *Garmon* doctrine did not require the invalidation of a federal requirement that certain contractors use affirmative action plans, even though the requirement had the effect of barring the use of "hiring hall arrangements" that are expressly permitted by the NLRA.[8] In view of the correctness of the decision in this case, as well as the absence of any circuit conflict, this case does not merit the Court's review.

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[8] Although petitioners cite (Pet. 13) an unreviewed district court decision that preliminarily enjoined a municipal airport rule based on an arguably more expansive view of the *Garmon* preemption doctrine, the defendants in that case "essentially conceded" that "the rule [was] preempted under the *Garmon* doctrine," and argued only that the rule came within a "market participant" exception to *Garmon* preemption. *Aeroground, Inc.* v. *City & County of San Francisco*, 170 F. Supp. 2d 950, 956 (N.D. Cal. 2001), appeal dismissed, No. 01-16602 (9th Cir. Dec. 28, 2001). Moreover, because *Aeroground* involved a municipal regulation, not an Executive Order of the President, the case is readily distinguishable from this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

1. At the threshold, the Respondents assert that the decision below "does not conflict with any decision of this Court or any other court of appeals." Br. in Opp. 6. That assertion is incorrect.

As our certiorari petition demonstrates, Pet. 10-14, the D.C. Circuit's reformulation of the *Garmon*[1] preemption doctrine is fundamentally inconsistent with this Court's *Garmon* doctrine jurisprudence. And, since the filing of our petition (but prior to the filing of the brief in opposition), the Ninth Circuit has rendered a decision that—drawing on this Court's *Garmon* precedents—is directly at odds with the D.C. Circuit's decision in the instant case. *See Associated Builders and Contractors of Southern California, Inc. v. Nunn*, 356 F.3d 979, 987 (9th Cir. 2004).

[1] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

According to the D.C. Circuit, the *Garmon* doctrine is *not* a "'field' preemption" doctrine but rather a set of discontinuous preemption rules that "operat[e] only as to activities arguably protected or prohibited, *not* to ones simply left alone [by the NLRB], even if left alone deliberately." Pet. App. 5a (emphasis in original). Thus, once "the Board has decided that [a labor relations] activity is not prohibited," *id.*—but rather left to employer or union option as a permissible activity—that activity may be regulated by governmental bodies other than the NLRB in a manner that "conflicts with the 'regulatory scheme' the Board has established," *id.* at 4a.

In contrast, the Ninth Circuit understands the *Garmon* doctrine to be what this Court's decisions show it to be—a field preemption doctrine:

> "*Garmon* preemption prohibits states from regulating fields that Congress intended to occupy fully through the creation of a continuum between conduct that is either protected or prohibited by the NLRA. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). The purpose of *Garmon* preemption is 'to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the "integrated scheme of regulation" established by the NLRA.' *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 (1986) (quoting *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986))." *Associated Builders and Contractors*, 356 F.3d at 987.

In the Ninth Circuit, then, the *Garmon* doctrine provides protection against regulation by other governmental bodies of labor relations conduct across the "continuum between conduct that is either protected or prohibited by the NLRA," including conduct that the NLRB has determined the NLRA permits but does not require. And, as the court below acknowledged, "under [such a] 'field' preemption [theory]" —as opposed to the D.C. Circuit's *Garmon* theory of the

court below—Executive Order 13201, the order at issue here, "is preempted because it conflicts with the 'regulatory scheme' the Board has established" by its decision in *Rochester Mfg. Co.*, 323 NLRB 260 (1997). Pet. App. 4a-5a.

2. The Respondents' main effort to square the D.C. Circuit's decision with this Court's decisions is to misstate what the *Garmon* opinion says. According to the brief in opposition (at p. 8), "*Garmon* itself recognized that, when the NLRB has 'decide[d] that an activity is neither protected nor prohibited' by the NLRA, state or local regulation of the activity is not preempted under the principles articulated in that case. 359 U.S. at 245." What the *Garmon* opinion actually says is that "the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S. at 245. And, the point of that statement is to lay the groundwork for such decisions as *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181 (1965), and *Longshoremen v. Davis*, 476 U.S. 380 (1986). *See* Pet. 11 n. 5 (discussing *Hanna Mining* and *Davis*); Br. in Opp. 8 (discussing *Davis*).

An NLRB decision that an activity is neither protected nor prohibited "raise[s] the question whether such activity may be regulated by the States," because the decision's preemptive effect depends on the Board's basis for concluding that the activity is neither protected nor prohibited by the NLRA. Where, to take the example that has emerged, the Board holds that certain conduct is neither protected nor prohibited because the conduct concerns an individual who is not covered by the NLRA, there is no reason for preempting regulation by the states (or by other governmental bodies) of that conduct. And, *Hanna Mining* and *Davis* so recognize. Simply stated, non-NLRB regulation of conduct that is *not covered by the NLRA* presents no danger of conflict with "Congress' 'integrated scheme of regulation.' *Garmon*, 359

U.S. at 247." *Building & Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U.S. 218, 225 (1993).

But it is an entirely different matter where the Board's determination concerns "conduct subject to the regulatory jurisdiction of the NLRB," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985), and the Board's determination is that the Act neither protects nor prohibits the conduct in question but rather leaves it to employer or union option as permissible conduct. The Respondents tacitly recognize as much—and the thereby tacitly admit that the D.C. Circuit's decision cannot be squared with this Court's *Garmon* doctrine precedents—by acknowledging that where particular labor relations conduct has been "left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA," the Board's "choice . . . may be insulated [by NLRA preemption] from conflicting state regulation.". Br. in Opp. 11 n. 7.

No other conclusion is consistent with this Court's decisions. The office of NLRA preemption is "to avoid conflicting regulation of conduct [coming within the regulatory authority of the NLRB] by various official bodies which might have some authority over the subject matter." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-286 (1971), and to do so by "prevent[ing] a State [or other law maker] from regulating within . . . a zone protected and reserved . . . for NLRB jurisdiction," *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 226-227.[2]

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[2] For sake of completeness, we note that *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), cited and discussed at Br. in Opp. 9, is inapposite. In *Garmon*, the Court refused "to find withdrawal from the States of power to regulate . . . where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." 359 U.S. at

To be sure, the Respondents do make a failed attempt to reconcile their telling concession regarding the preemptive effect of the Board's "choice" that particular labor relations conduct should be "left unregulated" with their defense of the decision below by asserting that such a Board "choice" would be "insulated from conflicting state regulation on non-*Garmon* grounds" under "the doctrine of *Machinists* pre-emption." Br. in Opp. 10-11 n. 7, citing *Lodge 76, International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976).

The difficulty is that the *Machinists* preemption doctrine does *not* address conduct that the NLRB may or may not regulate as a matter of "choice." Br. in Opp. 11 n. 7. "The *Machinists* rule creates a free zone from which all regulation, 'whether federal or State,' [*Machinists*, 427 U.S.] at 153, is excluded." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989).[3] The truth of the matter is that the Board's "choice" to "le[ave] unregulated" certain labor relations conduct is protected by the *Garmon* preemption doctrine or not at all. And, this Court's decisions

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243 (citation omitted). In *Sears*, the Court gave meaning to that limit by "refus[ing] to apply the *Garmon* guidelines in a literal, mechanical fashion" so as to "sweep[] away state-court jurisdiction over [trespassory] conduct [that was] traditionally subject to state [property law] regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected." 436 U.S. at 188. The conduct regulated by Executive Order 13201 is quite plainly not conduct that is traditionally subject to state or to Executive Branch regulation.

[3] The *Machinists* rule rests on the understanding "that Congress intended to give parties to a collective-bargaining agreement the right to make use of 'economic weapons,' not explicitly set forth in the Act, free of governmental interference," and "that Congress meant that these activities . . . were not to be regulable by States any more than by the NLRB." *Golden State Transit*, 493 U.S. at 111 & n. 8.

make it plain that the *Garmon* doctrine does protect the Board's "choice" in this regard from conflicting regulation by other governmental bodies.

Equally to the point, there is no question that the Board's determination in *Rochester Mfg., supra*, not to require employers to post notices describing employees' NLRA rights with respect to union security agreements represents precisely a "choice" that this matter be "left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA." Br. in Opp. 11 n. 7. Thus, on Respondents' own terms—but not on the D.C. Circuit's terms—that decision reflects a choice protected by NLRA preemption from conflicting regulation.

The question of whether employers should be required to post notices regarding NLRA rights is most certainly a matter within the "zone protected and reserved . . . for NLRB jurisdiction." *Associated Builders and Contractors of Massachuseits*, 507 U.S. at 227. Indeed, the brief in opposition (at p. 10 n. 6) reveals that the NLRB is currently considering "two rulemaking petitions on whether employers should be required to post notices of *Beck* rights or more expansive notices advising employees of their federal rights and obligations under the NLRA." The Board's "choice" in responding to those petitions as to whether to require such employer conduct coming within its jurisdiction is one the Board must make for "reasons of statutory policy under the NLRA."[4]

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[4] Under the D.C. Circuit's decision, the Executive Order notice requirement will be preempted should the NLRB decide to adopt a notice posting requirement, Pet. App. 5a ("a reversal of position by the Board . . . will entail a reversal of this outcome on preemption"), with the ironic effect that the consequences of failing to post the notice will be less severe, since the Board does not have the authority to impose the debarment penalty imposed by the Executive Order.

3. In the end, the Respondents abandon all pretense that the D.C. Circuit's decision in this case can be reconciled with this Court's *Garmon* doctrine precedents and simply assert that the D.C. Circuit has been wrong to treat Executive Order regulation of labor relations as subject to the NLRA preemption rules that apply to state or local government regulation of labor relations. Br. in Opp. 11-12. The Respondents do not attempt to explain why conflicting Executive Order regulation of private sector labor relations is any less disruptive of "Congress' 'integrated scheme of regulation,' *Garmon*, 359 U.S. at 247," *Associated Builders and Contractors of Massachusetts*, 507 U.S. at 225, than conflicting state or local regulation. For present purposes, however, it suffices that the D.C. Circuit *does* apply its reformulation of the *Garmon* doctrine to Executive Order regulation of private sector labor relations, *see* Pet. App. 3a-4a, and that its reformulation of the *Garmon* doctrine conflicts with this Court's *Garmon* doctrine jurisprudence.

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